127-399

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 263.

JAMES W. HOSFORD AND CHARLES GAGNON, COPARTNERS UNDER THE FIRM NAME OF HOSFORD & GAGNON, PLAINTIFFS IN ERROR,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER FIRE INSURANCE COMPANY, ASSOCIATED TOGETHER UNDER THE NAME OF THE UNDERWRITERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 3, 1885.

he first saw one having a tube like it, and first answers "about two years ago, at John Holland's" (p. 14); but on cross-examination says it must have been between three and four years; that Tyrrell was superintendent at Holland's at the time; that Tyrrell made the case and told the witness that he had studied over it and worked it out, and that they would not have any more trouble with their points.

For the reasons briefly mentioned we submit that the decree below was correct, and should be affirmed.

Respectfully, etc.,

E. E. Wood,
Edward Boyd,
Counsel for Appellees.

Cincinnati, O., October, 1887.

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1 Pleas in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, before the Honorable David J. Brewer, judge of the circuit court of the United States for the district of Nebraska, and the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court at the May term, 1885.

Be it remembered that on the 5th day of May, 1885, a transcript was filed in the clerk's office of said circuit court, in which transcript is contained the petition, answers, reply, petition and bond for removal, and certificate of clerk, in words and figures following, to wit:

Petition.

In the District Court in and for Richardson County and State of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Copartners in Business in the Firm Name of Hosford and Gagnon, Plaintiffs,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER FIRE INSURANCE Company, an Association of Insurance Companies Associated Together and Doing Business in the Name and Style of The Underwriters, and Israel May, Defendants.

2 The said plaintiffs complain of the said insurance companies, defendants, for that at the time hereinafter mentioned the said insurance companies, defendants, was and still is a corporation duly organized under the laws of the State of New York, and has complied with all the laws of the State of Nebraska regulating the business of such insurance companies in the State of Nebraska, and duly authorized to do business in said State of Nebraska, with full power to insure property against loss or damage by fire in the said State of Nebraska; that on the 14th day of May, A. D. 1883, the said plaintiffs were the owners of their four-story brick-and-stone metal-roof mill building and two-story frame metal-roof addition, known as the "Rulo City mill," operated by plaintiffs, with fixed and movable machinery, shafting, gearing, and belting all contained therein, and their frame, with stone basement, metal roof, steam-power grain-elevator building, and addition thereto, including bins, spouts, bridges, or driveways connected therewith, and gearing, belting, scales, corn-sheller, fanning-mill, and other machinery contained in said elevator, all owned and occupied by said plaintiffs, and situated on lots 5 and 6, in block No. 5, in Rulo, Richardson county, and State of Nebraska; and said insurance companies, defendants, on said day, in consideration of the sum of three hundred and twenty dollars ($320), paid then and there by said plaintiffs to the said insurance companies, defendants, as a premium, executed and delivered to the said plaintiffs a policy of insurance in the usual form.

The original policy having been destroyed by fire, the copy of said policy furnished these plaintiffs by said insurance companies, defendants, since the fire, is believed to be a true copy of the said original policy, and herewith attached and made a part of this petition as Exhibit "A."

The said plaintiffs further allege that on the night of the first day of August, A. D. 1883, the said property was burned and wholly destroyed by fire, except only one grain cleaner, worth one hundred dollars ($100), and one corn millstone, worth one hundred
3 dollars ($100), and four wood stave hoops, worth $20.00 each, or about eighty dollars for the four hoops; two Vandergrift machines, valued at about $40, or about eighty dollars for the two, and two silent grain feeders, worth about four dollars each, or about eight dollars for the two, and about one hundred feet of belting and elevator buckets, worth about thirty ($30) dollars; and the total value of property saved as above is about three hundred and ninety-eight dollars ($398.00), and no more; that said fire did not originate by any act, design, or procurement on the part of these plaintiffs, and none of the property was lost by theft at or after the fire, nor was the fire caused by invasion, insurrection, riot, civil commotion, military or usurped power, nor from any other cause mentioned in said policy as an exception touching the liabilities of said insurance companies, nor from any cause or causes whatsoever excepted to in the said policy of insurance; that immediately after the fire—that is, on the 2d day of August, A. D. 1883—the said insurance companies, defendants, were notified of the fire and loss thereby of the said property, and again on the 20th day of August, A. D. 1883, the said plaintiffs gave said insurance companies a further notice and due proof of said fire and loss, and have duly performed, on their part, all the conditions of said policy of said insurance; that the said buildings and property above described and named and insured in said policy of insurance — worth, when destroyed, twenty-one thousand nine hundred dollars ($21,900), and the plaintiffs' loss thereby amounted to more upon each part of the property separately mentioned and insured in the said policy than the amount of such separate insurance named in said policy; that on the 1st day of November, A. D. 1883, the said plaintiffs demanded of said insurance companies, defendants, the payment of said insurance, but they have wholly refused and neglected to pay the same, and that said
4 Israel May had and still has a mortgage on said property, as stated in said policy of insurance; that said mortgage of said Israel May's does not exceed three thousand and five hundred dollars ($3,500), and that the said Israel May is made a party defendant hereto and required to set out the extent of his interest in this controversy, to the end that his interest herein be duly protected in this action.

No part of said insurance on said property has been paid, nor have the said insurance companies, def'ts, replaced or offered to replace said property and there is now due from the said insurance companies, defendants, to the said plaintiffs on said policy the sum of eight thousand dollars ($8,000), with interest thereon from the 2nd day of

August, A. D. 1883, at the rate of seven per cent. per annum, and for which sum the said plaintiffs ask judgment against the said insurance companies, defendants, and for all costs.

GILLISPIE & REAVIS,
Att'ys for Pl'ffs.

STATE OF NEBRASKA, }
Richardson County, } ss:

I, James W. Hosford, being first duly sworn, depose and say: I am one of the plaintiffs in the above-entitled action, and I believe the facts stated in the foregoing petition to be true.

JAMES W. HOSFORD.

Subscribed in my presence and sworn to before me this 3rd day of November, A. D. 1883.

T. C. CUNNINGHAM, *Clerk.*

Attached to said petition is Exhibit "A" in words and figures following, to wit:

$8,000.00. PLAINTIFFS' EXHIBIT A.

Underwriters' Policy.

Copy of policy No. 20157.

5 By this policy of insurance the Germania Fire Insurance Company and the Hanover Fire Insurance Company, each of the city of New York, each acting and contracting for itself and not one for the other, in consideration of one-half part of the sum of three hundred and twenty dollars to each of them paid by the assured hereinafter named, do each insure with Hosford and Gagnon, of Rulo, Neb., against loss or damage by fire, the amount of one-half part of the sum of eight thousand dollars for the term of one year, $1,500 on their four-story brick-and-stone metal-roof mill building and two-story frame metal-roof addition, known as the Rulo City mill, operated by assured, and $4,500 on fixed and movable machinery, shafting, gearing, and belting; all contained therein; $1,500 on their frame, with stone basement, metal roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith; $500 on gearing, belting, dales, corn-sheller, fanning-mill, and other machinery contained in said elevator; all owned and occupied by assured. Situation, lots 5 and 6, block 5, in Rulo, Richardson county, Nebr., special reference being had to assured application No. 20157, which is hereby made a part of this policy and a warranty on the part of the assured, $4,000.00 additional insurance concurrent herewith permitted, loss, if any, payable to Israel May, mortgagee, as his interest may appear.

And each of the said companies agrees to make good to the assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured by said companies as aforesaid, as shall happen by fire to the property above specified from the fourteenth day of May, 1883, at noon, to the

fourteenth day of May, 1884, at noon, the amount of such loss or damage to be estimated according to the actual cash value at
6 the time of the loss and to be paid sixty days after due notice and proofs of the same, made by the assured and received at the office of the general agency of the said companies in the city of New York in accordance with the terms of this policy hereinafter mentioned; but provided in case differences shall arise touching any loss or damage after proof thereof has been received in due form the matter shall, at the written request of either party, be submitted to arbitrators indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy; and Provided further, That it shall be optional with the companies to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs herein required; and in case the companies elect to rebuild the assured shall, if required, furnish plans and specifications of the building destroyed. Neither of the companies shall be liable for loss by theft at or after a fire, nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military usurped power; nor for the loss of money, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for loss or damage from fires in buildings unprovided with good and substantial stone or brick chimneys, unless the character of the chimneys used be represented to the companies and described in the policy; nor for loss or damage originating in neglect or deviation from laws or regulations of police where such exist; nor for loss or damage caused by the falling of any building or from any fire ensuing therefrom; nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance;
7 nor for loss or damage by lightning or the explosion of a steam-boiler, unless fire ensues, and then for the loss or damage by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning; nor for loss or damage caused by removal of property from a building, except it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and by the companies, respectively, in the proportion that the sum hereby insured bears to the whole value of the property insured. Bullion, jewels, plate, watches, musical instruments (except one piano or melodion as a part of the furniture of a dwelling-house), scientific instruments, ornaments, medals, printed music, engravings, paintings, picture frames, sculptures, casts, curiosities, models, patterns, or plate-glass in doors or windows, when the plates are of the dimensions of three feet square or more; also store furniture or fixtures, unless particularly specified in writing on the policy and separately and particularly insured, are not protected by this policy.

If a building shall fall, except as a result of a fire, all insurance under this policy on it or its contents shall immediately cease and determine. The cash value of the property destroyed or damaged

by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property from use or otherwise a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

The application, survey, plan, or description of the property herein insured shall be considered a part of the contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the
8 property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured, prior to or during the term of this policy, shall have made or shall make any fraudulent or false representations to the authorities touching the property hereby insured or property contained therein with intent to defraud the public revenues; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the companies written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever within the knowledge or control of the assured, without the written assent of the companies endorsed hereon, or if the property be sold or transferred or any change take place in title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance; or if this policy shall be assigned before or after a fire without the consent of the companies endorsed hereon, or if the premium shall be unpaid, or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise is not truly stated in this policy; or if the assured shall keep or use upon the said premises gunpowder, or phosphorus, or petroleum, or rock, or earth, oils, or benzole, benzine, or naphtha, camphene, spirit gas, or chemical oils, or any explosive substance without written permission in this policy, then, and in every such case, this policy shall be void; and in no case shall the right to keep or use these articles be presumed from the character of the occupation insured without such specific permission in writing on the policy:

Provided, however, that without such written permission,
9 the assured may keep upon the said premises for sale not exceeding twenty-five pounds of gunpowder if the same be kept in close tin canisters and be sold only by daylight, and that he may also keep for sale or use upon the said premises not exceeding five barrels of kerosene or illuminating oil, which shall be of the U. S. standard of 1108, not to be handled or sold by artificial light within the distance of fifteen feet.

To protect themselves against such increase or change of the risk as may not, under the above conditions, render this policy void the companies reserve to themselves the right at any time and for any cause to return the assured the unexpired premium *pro rata*, which shall have the effect to cancel and annul this policy. This insur-

ance may be determined at any time at the request of the assured, in which case the companies shall retain only the customary short rates for the time the policy has been in force. Insurance once made may be continued for a further term, the premium therefor being paid and a renewal receipt given for the same, and it shall be considered as continued under the original representation; but in case there shall have been any change in the risk, either within itself or by adjacent buildings, not made known to the companies by the assured at the time of the renewal and specially entered in writing on the policy renewed, this policy and renewal shall be void.

If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured or be encumbered by any lien, whether by deed of trust, mortgage, or otherwise, or if the building insured stands on leased ground, it must be so represented to the companies and so expressed in the written part of this policy; otherwise this policy shall be void.

10 In case of other insurance upon the property hereby insured, whether by specific or general or floating policies and whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of the companies, respectively, such proportions of the loss sustained, not exceeding the sum insured, as the sum insured by each of them bears to the whole amount insured thereon, and in case the assured hold any other policy on the insured property subject to conditions of average this policy shall be entitled to like conditions.

In case of loss the assured shall use their best endeavors in saving and protecting the property from damage at and after the fire; if they shall fail so to do the companies will not be liable for damage caused by such failure, and there can be no abandonment to the companies of the property insured.

The assured shall forthwith give notice of said loss to the companies through their general agent, in the city of New York, and, as soon after as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used, when and how the fire originated, and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds nearest to the place of the fire, not concerned in the loss, as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property in-

11 sured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath, apart from all

other persons except the attesting magistrate or notary, or any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examination when reduced to writing, and shall also produce their books of account and other vouchers and all the remains of property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices the originals of which have been lost, and exhibit the same for examination to any person named by the companies. Damage to property not totally destroyed shall be appraised by disinterested men, mutually chosen by the assured and the companies, and sworn to decide impartially, and the companies reserve the right to take the articles damaged or any part thereof at their appraised value. When personal property is damaged the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, under oath, in writing, shall form a part of the proofs hereby required, one-half the appraisers' fees to be paid by the companies. In case of loss of property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured and transfer of this policy shall have been sanctioned
12 in writing by the companies; and until such proofs, declarations, and certificates are produced and examinations and appraisals permitted the loss shall not be payable. All fraud or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claims under this policy.

Reassurance, if hereby made for any other insurance company, to be on a basis of such liability that in the event of loss these companies are each to pay only their proportion of said loss *pro rata* with said other company as the amount reassured bears to the whole amount insured by such other company.

It is furthermore hereby expressly provided and mutually agreed that no suit or action against either of these companies for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur, and should any suit or action be commenced after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

And the said companies respectively agree that in case the assured shall have to resort to judicial proceedings for the purpose of enforcing his claims under this policy it shall not be necessary for him to proceed against each of them, but that he may bring his action against either of them, and that the other shall be bound

and concluded by the result of such action in the same manner and to the same effect as if it had been prosecuted against each of them separately with the like result.

It is further understood and made part of this contract that the agent of these companies has no authority to waive, modify,
13 or strike from the policy any of its printed conditions nor is his assent to an increase of risk binding upon the companies until the same is endorsed in writing on the policy and the increase premium be paid, nor in the event that this policy shall become void by reason of any of the conditions thereof shall the agent have power to revive the same except by issuing a new policy, and any policy so made void shall remain void and of no effect until revived by the actual issue and delivery to the assured of the new policy, any contract by parol or understanding with the agent to the contrary notwithstanding.

It is further understood and agreed by and between the parties hereto that nothing herein contained shall be construed as creating or importing any joint liability on the part of the above-named companies, but that each of the said companies shall be regarded as only severally liable upon this policy for the amount insured by each under the same, in the same manner, and not otherwise, as if each had issued its separate policy for the proportionate amount which each insures as above mentioned; and if any additional amount shall be endorsed upon this policy it is to be with the understanding that the said companies each become insurers only for one-half of such additional amount.

This policy is made and accepted upon the above express conditions, but the same shall not be valid unless countersigned by the duly authorized agent of said companies at New York.

[Written across the face:] Canceled for use. A copy.

In witness whereof the said companies have respectively caused these presents to be signed by their respective presidents and attested by their respective secretaries in the city of New York.

THE GERMANIA FIRE INSURANCE COMPANY OF NEW YORK.
"REED GANIGUE," *President.*
HUGO SCHUMANN, *Secretary.*
14 THE HANOVER FIRE INSURANCE COMPANY OF NEW YORK.
B. S. WALCOTT, *President.*
J. REMSEN LAW, *Secretary.*

Countersigned by the agent of the above-named companies, Falls City, Neb., agency, this 14th day of May, 1883.

FRED W. MILLER, *Agent.*

Said exhibit is endorsed as follows: No. 20157. Underwriters' policy. Issued by the Germania Fire Insurance Co and the Hanover Fire Insurance Co. of the city of New York. Office, 175 Broadway. Hosford & Gagnon. On mill and machinery. Amount insured, $8,000; premium and fees, $320.00. This policy expires May 14, 1884, at noon.

Answer of the Insurance Companies.

STATE OF NEBRASKA, *Richardson County:*

In District Court. March Term, 1884.

JAMES W. HOSFORD and CHARLES GAGNON, Partners under the Firm name of Hosford & Gagnon, Plaintiffs,

vs.

THE GERMANIA FIRE INSURANCE COMPANY and THE HANOVER FIRE INSURANCE COMPANY and ISRAEL MAY, Defendants.

Separate answer of insurance companies.

Now comes the above-named defendant insurance companies, and for answer to the petition of plaintiff filed herein say:

1st. They deny each and every allegation in said petition contained, except such as are herein expressly admitted. Said defendant admits the issue by these defendants to said plaintiffs a policy of insurance upon the property mentioned in said petition of the date and for the length of time therein charged, and that the
15 property was partially destroyed by fire at the time in said petition alleged. They further admit that they were incorporated and empowered under the laws of the State of New York and the State of Nebraska to do business in said State of Nebraska.

2nd. But these defendants, further answering, say that said plaintiffs should not have nor recover of and from these defendants anything in this action, because before the making of the contract of insurance contained in the policy sued upon herein, and as a part of the said contract of insurance, and as an inducement to these defendants to enter into said contract of insurance, said plaintiffs made a certain application in writing to these defendants for the issue to them (plaintiffs) by defendants of the policy of insurance sued on herein; a copy of said application is hereto attached and marked "A" and made a part hereof. Said application was in writing and signed by said plaintiffs, and the same was understood and agreed by and between all the parties thereto to contain representations and statements by said plaintiffs to these defendants concerning the size, capacity, value, title of said property, liens, and encumbrances against said property, the size and value of the machinery, the value of the whole property, the percentage of the whole value which the property earned each year, and the profitable character of the whole property as an investment, and that said statements and representations were made by the plaintiffs to these defendants as warranties of all the facts as stated in said application, and that these defendants received said application and warranty and examined therein and relied upon the same, and upon the faith and credit of said application and the representations and warranties therein by plaintiffs made issued said policy of insurance. But these defendants aver that the statements and representations therein contained are and were, at the time the same were made, wholly false
16 and were well known by these plaintiffs at the time to be false, and were so made by these plaintiffs at the time for the

purpose of misleading and defrauding these defendants by securing from these defendants insurance largely in excess of the real value of said property; that the statements in said application, that said mill was 4 stories high; that the boilers were encased in brick walls 18 inches thick; that the fuel was kept 10 feet from the mouth of the furnace; that none of the machinery or shafting run in wooden boxes; that all parts of the machinery run cool; that there were two casks of water kept constantly filled ready for use in each loft; that two buckets were kept for each cask and used for no other purpose; that the cash value of the building, including only the destructible portion above the foundation, mill gearing, machinery, and fixtures, engine, and boilers, was $18,000.00; that the mortgage upon said property only amounted to $3,000.00, and that the mill had been a profitable investment for the past three years to the amount of 15 per cent. per annum on the total investment, and was likely to continue thus profitable; were each and all false and fraudently made by plaintiffs to the defendants, and by reason of the false and fraudulent statements so made in said application and by reason of the breach of the several warranties therein contained said policy was void, and these defendants incurred no liability thereunder.

3d. And these defendants, further answering, say that the plaintiffs have never furnished these defendants with any proof of loss, as required by the terms and conditions of said policy, and that no action accrues to said plaintiffs on said policy until after such proofs of loss have been made and furnished to the defendants, as stipulated in said policy.

17 4th. And these defendants, further answering, say that the said plaintiffs, wickedly and corruptly intending to injure, cheat, swindle, and defraud these defendants out of a large sum of money, falsely and fraudulently stated and represented to these defendants, by their application in writing, a copy of which is hereto annexed, that the actual cash value of the building insured, including only the destructible portion above the foundation, mill gearing, machinery, and fixtures, engine, and boilers, was $18,000.00, when in truth and in fact same was not worth more than $9,000, and said plaintiffs at the time well knew such was the fact, and by such false and fraudulent statements and representations said plaintiffs procured insurance upon said property from these defendants and other insurance companies in a sum largely in excess of the actual cash value of said property, to wit, in the sum of $12,000.00, and that said over valuation and fraudulent and false statements were so made to these defendants and other insurance companies to secure such excess insurance with the design on the part of said plaintiffs to destroy said property and make these defendants pay for the same; and that in pursuance of such wrongful design said plaintiffs caused or procured the fire which injured the property as complained of in plaintiffs' petition.

Wherefore said defendants pray that they may be hence dismissed with their costs herein expended.

MARTIN & GILMAN,
Att'ys for Ins. Cos.

STATE OF NEBRASKA, } ss:
Richardson County, }

I, Fred. W. Miller, being first duly sworn, depose and say: I am the agent of the above-named Germania and Hanover Fire
18 Insurance Companies, defendants; that I know the contents of the foregoing answer and believe the same to be true.

FRED. MILLER.

Subscribed in my presence and sworn to before me this — day of February, 1884.

CHAS. LOREE,
Clerk Dist. Court.

Filed Feb. 18, 1884.
[SEAL.]

CHAS. LOREE,
Clerk Dist. Court.

Attached to said answer is application marked "A" in words and figures following, to wit:

This application is to be forwarded to A. Stoddard, general agent, for approval before insurance is made binding.

No. 20157. $8,000.

NEW YORK, UNDERWRITERS' AGENCY,
No. 175, BROADWAY,

The estimated value of personal property and of each building to be insured and the sum to be insured on each must be stated separately.

Application of Hosford & Gagnon, of Rulo, in the county of Richardson and State of Nebraska, for insurance against loss or damage by fire by the Germania & Hanover Fire Insurance Companies in the sum of eight thousand dollars (one-half of said sum to be insured by each of the above-named companies) on the property specified, the value of the property being estimated by the applicant.

On mill & elevator buildings.	Valuation.	Sum to be ins.	Rate.
On mill, $1,500	$7,000	$3,000	4 %
On elevator, $1,500			
In mill, $4,500			
In elevator, $500			
On machinery, gearing, and fixtures (exclusive of boiler and engine)	$11,000	$5,000	4 %

The applicant will answer particularly the following questions and sign the same as descriptive of the premises and forming a part of the contract of insurance and a warranty on his part:

19 What is the name of the mill or elevator?
Rulo City mill and elevator.

How far is the mill located from the place at which this application is made?
10 miles.

Is the property now insured? If so, state companies and rate paid.
None.

Is it a flouring mill or grist-mill for custom only?
Flouring.

Has the mill ever been remodeled or rebuilt; if so, when, what addition and improvements made, and what new machinery introduced?
Yes; changed boiler, built conveyers and elevators.

Is the building of stone, brick, or wood? When was it built?
Stone, brick, & wood; 1879, 1880, 1882.

Is it on leased ground? When does lease expire?
No.

Of what material is the roof?
Metal.

If frame, has it an outside covering of slate or iron?
No.

Size and number of stories high?
Mill, 4, 30 x 40; flour or ware room, 2, 16 x 40; elevator, 26 x 38 and 20 x 24.

How high betweeen the joists?
9, 12, 14; attic.

Is the frame-work substantial, so that the shafting runs true?
Yes.

Has any part of the mill settled or sagged? If so, state all about it particularly.
No.

Is the building kept clear of rubbish, refuse, and cobwebs?
20 Do you agree to keep it in good condition?
Yes.

Is motive power water or steam?
Steam.

If propelled by water power, is the supply sufficient to keep the mill in constant operation? If not, state how many months during the year the supply is deficient.
1.

If propelled by both steam and water power, state what portion of the time by each.
1.

If propelled by steam power, where is the engine and boiler located? Is engine-house of stone, brick, or wood?
Between mill and elevator.

Is the boiler a single or return flue boiler?
Return.
How thick are the walls enclosing the boiler?
18 inches.
With what is top of boiler covered?
Brick.
Give the exact distance of the boiler walls from the wood-work overhead and on the sides.
Overhead 5 ft.; stone walls on sides.
Is a careful and competent engineer constantly employed, and does he attend to any other duty when the engine is in use?
Yes; no.
What materials are used for fuel—for steam boiler, for stoves?
Coal, wood, & cobs; wood.
How many feet from the mouth of furnace to the place where the daily supply of fuel is kept?
10 ft.
How far from furnace door to wooden floor or wooden walls?
None.
Is the boiler chimney in the building; if not, where is it?
Yes.

[Written across the face:] Rate approved by C. A. Babcock, G. A., May 17, '83.

21 (Show the location on the diagram.)
How high is it, and does it rise above the peak of the roof, and how far?
18 ft. above peak.
Is it of brick or iron; if brick, how thick are the walls?
Iron.
Do the floors or floor timbers or roof or other wood-work come in contact with it? If not, give the exact space that intervenes.
6 inches.
If the chimney is of iron, is it in good condition, perfectly sound, securely braced?
Yes.
How many feet from any wood-work, and how protected?
6 in. from roof boards; by metal covering.
How many stoves are in the building and adjoining premises?
2.
What kind, and where situated?
Wood; 1 in mill and 1 in office.
Are they sound and in good order; what is under them?
Yes; zinc.
How far from any partition or wood-work?
Safe distance.
Is the fuel ever piled under or near the stoves?
No.
How are the ashes disposed of?
Safe distance.

Will you agree that they shall not be deposited in wooden vessels in the building, and that they shall be duly and carefully removed to safe distance from the premises?

Yes.

How many feet of stovepipe are used; is it in good order and well secured?

10 ft.; yes.

22 Do the stovepipes enter the chimney perpendicularly or horizontally?

Horizontally.

Do any of them pass through a partition or floor? If so, how secured and how near do they come to wood-work?

No.

Do any of them pass out of the building without entering the chimney? If so, how are they secured and what is the length of the pipe outside of the building?

No.

Do the pipes enter brick chimneys? If so, are the chimneys built from the ground; if not from the ground, from which floor, and do they rise above the peak of the roof and how far?

Yes, in mill, and below ceiling in office.

On which floor is smut machine located?

Ground.

Is it entirely of iron? Whose pattern is it?

Wood frame; California.

Is the lower box kept constantly supplied with oil or tallow?

Yes.

How many revolutions does it make per minute?

650.

What portion of the time is it in operation?

$\frac{1}{4}$.

Can it readily be flooded from fume or by hose?

No.

Is the smut blown out of the building by the machine or allowed to accumulate?

Blown out.

How often have you heretofore removed the accumulated smut from under the machine and from the room?

Does not accumulate.

23 Do you agree to clean it out carefully every day during the period of this insurance?

Yes.

How many run of burr stone, what diameter, and for what work used?

5–4; 42 in.; wheat. 1, 20 in.; corn.

How long has each run been in use?

4, 3 years; 1, 2 years.

How many pairs of rollers?

None.

How many middling purifiers?

Is mill furnished with asperators and Sturtevant fans?

No.

Is there a bran duster or separator in the mill, and where is it located?

Yes; upper floor.

How many revolutions does it make per minute?

275.

Does any part of the machinery or shafting of the mill run in wooden boxes? (Specify fully.)

No.

Do all parts of the machinery run well?

Yes.

What part has tendency to undue heat?

None.

What material is used for lubricating or oiling the bearings and machinery?

Tallow, lard, and machine oils.

Will you agree to use only lard and tallow, or sperm and lard oils for lubricating?

Lard and tallow, or lard and machine oils.

Is the machinery regularly oiled, and by whom?

Yes, by regular attendant.

24 Will you agree to keep all the bearings and machinery properly supplied with oil?

Yes.

Is there a watchman in the building during the night time?

No.

Is any other duty performed by the watchman than watching for the safety of the premises?

———.

Has fire ever occurred in the mill; if so, from what cause did it originate?

No.

Is there a good force-pump on the premises, expressly for putting out fire, in condition at all times for use?

No.

Are there casks of water in each loft constantly filled—ready for use?

Yes.

How many buckets for each cask used for no other purpose?

2.

During what hours does the mill run?

6 a. m. to 12 p. m.

Is it now in active operation?

Yes.

At what times during the year is it closed?

Nights only.

Is corn-shelling, meal-drying, elevating, saw-mill, or any other business carried on in the building, or near it? State fully.

Corn-shelling in elevator.

Are middlings stored in mill; what is the largest quantity kept on hand at any one time?

Yes; not to exceed 3½ tons.

What material is used for lighting the building?

Kerosene.

Are open or unprotected lights ever used?

No.

25 Are friction matches kept in the building? If so, in what manner?

Yes; in desk in office.

Is smoking or drinking of spirituous liquors allowed on the premises?

No.

Is the ground, mill, machinery, and stock in the mill all owned exclusively by the applicant for this insurance?

Yes.

Is the mill operated exclusively on account of the proprietors or under contract?

Proprietors.

How many hands are employed in the mill?

7 (seven).

What is the present cash value of the building to be insured, including only the destructible portion above the foundation, mill gearing, machinery and fixtures, engine and boiler?

Buildings, $7,000; mill and elevator, gearing, machinery, and fixtures, $11,000.

What is the average value of grain and flour in the mill? State each separately.

Grain, $2,500; flour, $800.

Is there any incumbrance on the property?

Yes.

If mortgaged, state the amount.

$3,000.

Is there any insurance by the mortgagee?

Yes.

What amount is insured on the property, building, mill gearing, machinery and fixtures, engine and boiler, and stock separately?

Buildings, $4,500; mill gearing, machinery, & fixtures, $7,500.

Does all the insurance attach on each subject exactly as

26 applied for herein?

Yes.

In what office and on whose account? Specify particularly.

Hartford, $4,000; Underwriters, $8,000.

Have you any reason to believe that your property is in danger from incendiarism from any cause whatever?

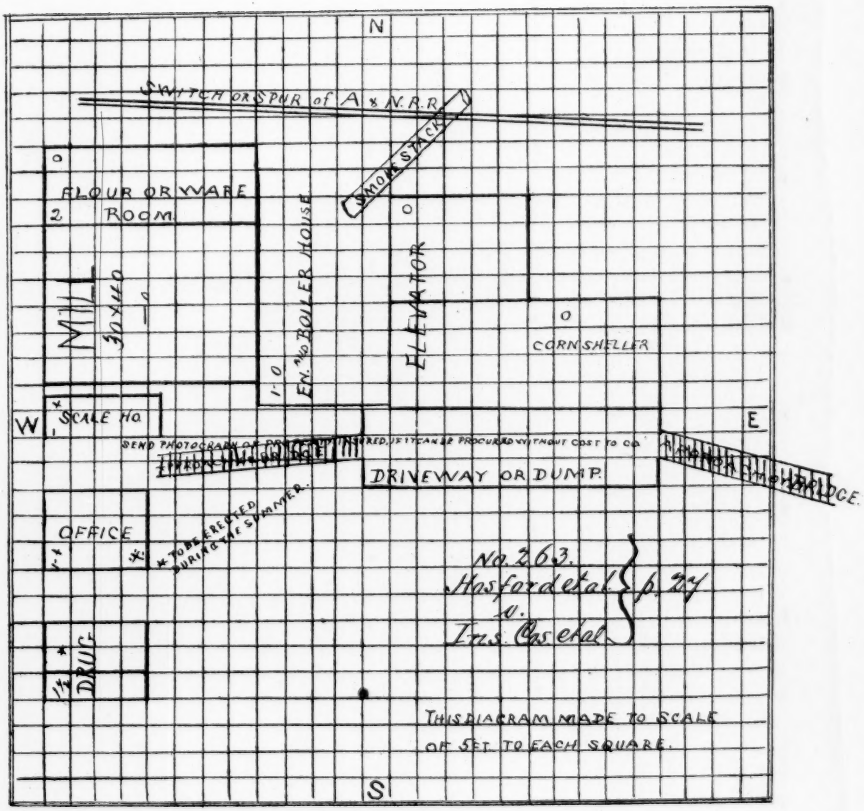
No.

To what extent has the mill been a profitable investment to the applicant during the past three years? Answer fully.

15 per cent. per annum on the total investment.

Is the mill likely to continue to be a profitable investment during the period of the insurance applied for?

Yes.


N
SWITCH OR SPUR of A. & N.R.R.
SMOKE STACK
FLOUR OR WARE
2 ROOM
MILL
3 STORY
1 STORY
EN. NO. ROLLER HOUSE
ELEVATOR
CORN SHELLER
W
SCALE HO.
E
SEND PHOTOGRAM OF PORTION MARKED, IF IT CAN BE PROCURED WITHOUT COST TO CO.
DRIVEWAY OR DUMP.
OFFICE
DRUG
S
No. 263.
Hasford et al
v.
Ins. Co's et al
THIS DIAGRAM MADE TO SCALE
OF 5FT. TO EACH SQUARE.

The subscriber requests insurance against fire by the Germania and Hanover Fire Insurance Companies, of New York, on the foregoing-described property, and hereby covenants and agrees to and with the said companies that the same is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risks of the property to be insured, and said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in and forming a part and parcel of the policy; and further covenants and agrees that if the situation or circumstances affecting the risk shall be so altered or changed during the time of any policy of insurance which may be fixed upon the application, or any renewal of said policy, as to render the risk more hazardous, will notify the officers of said companies, or their general agent, forthwith of such alteration.

Dated at Rulo, Neb., this 14th day of May, 1883.

(Signed) HOSFORD & GAGNON,
Applicant.

The survey in all cases to be signed by applicant.

27 *Diagram.*

NOTE.—Annex a ground plan of the premises; also a diagram of all buildings within 150 feet, with description of size, of what built, and occupancy. Make scale about ten feet to the square. Brick or stone designated by red; wooden buildings by black lines.

(Here follows diagram marked p. 27.)

28 *Answer of Defendant, Israel May.*

In the Richardson County District Court, State of Nebraska.

J. W. HOSFORD and CHARLES GAGNON, as Hosford and Gagnon,
vs.
THE UNDERWRITERS' FIRE INSURANCE COMPANY and ISRAEL MAY.

Now comes the defendant, Israel May, and files answer to the petition of plaintiffs filed herein, and says that there is due him on a mortgage held by him on the mill property described in said plaintiffs' petition, and to which reference is had on the policy of insurance sued on, the sum of thirty-three hundred and eleven dollars and fifty-six cents ($3,311.56), which said amount draws interest at the rate of eight per cent. per annum from December 1st, 1883, and provided by agreement of parties that in case the interest is not paid when due it is to be added to the principal and draw the same rate per cent. until paid; for which sum with his reasonable costs he prays judgment.

ISRAEL MAY, *Def't.*

STATE OF NEBRASKA, }
Richardson County, } *ss:*

Israel May, being first duly sworn, says that the facts stated in the above answer are true, as he verily believes.

ISRAEL MAY.

Subscribed in my presence and sworn to before me this 29th day of November, 1883.

[SEAL.] JOHN GAGNON,
Notary Public.

Filed November 30th, 1883.

T. C. CUNNINGHAM, *Clerk.*

29 *Plaintiff's Reply.*

In the Richardson County District Court, State of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Copartners in Business in the Firm Name of Hosford and Gagnon, Plaintiffs,
vs.
THE GERMANIA FIRE INSURANCE COMPANY AND THE Hanover Fire Insurance Company, an Association of Insurance Companies Associated Together and Doing Business in the Name and Style of The Underwriters, & Israel May, Defendants. } No. 1491.

Now come the plaintiffs and, for reply to answer of defendants filed herein, say:

1st. They deny each and every allegation of said matter in said answer contained by which any cause or causes of defense is or are in any of the second paragraphs thereof sought to be set up.

2nd. That F. W. Miller, who was and is the agent of said defendants, made particular survey and examination of the property insured, and which has since been destroyed by fire, at the time the application for insurance was made by plaintiffs, and was personally acquainted with the situation, condition, and value of said mill, machinery, elevator, and appointments and all the facts touching the risks so taken by defendants; and having made himself acquainted with said facts by a personal and careful inspection of said property, fully concurred with plaintiffs in their estimate of the value of said property and the character of the risk to be taken; and, pro-
30 nouncing the same first-class in all *reports*, the contract of insurance was made and the policy duly issued.

Plaintiffs deny each and every allegation of fraud and deceit in said answer contained.

Wherefore they pray judgment as they have heretofore prayed.

GILLESPIE & REAVIS,
Att'ys for Pl'ffs.

STATE OF NEBRASKA, } ss:
County of Richardson, }

James W. Hosford, one of the plaintiffs, being duly sworn, on oath says that he is acquainted with the facts in the foregoing reply and knows the contents to be true; and further saith not.

JAMES W. HOSFORD.

Sworn to before me and subscribed in my presence this 10th day of March, 1884.

GEO. D. KIRK,
Justice of the Peace.

Filed March 10th, 1884.

CHAS. LOREE,
Clerk — Court.

Petition for Removal.

STATE OF NEBRASKA, } ss:
County of Richardson, }

In the District Court of the 1st Judicial District of Nebraska, in and for Richardson County, Nebraska, to the March Term, A. D. 1884.

JAMES W. HOSFORD and CHARLES GAGNON, Partners under the Firm Name of Hosford & Gagnon,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER FIRE INSURANCE COMPANY.

The petition of the Germania Fire Insurance Company and the Hanover Fire Insurance Company, of New York city, both corporations organized and still existing under and by virtue of the laws of the State of New York, respectfully shows that James W. Hosford and Charles Gagnon, — the plaintiffs in this
31 suit under the name and style of Hosford and Gagnon, and that the same was brought by said plaintiffs on or about the third day of November, A. D. 1883, against your said petitioners in said district court of said Richardson county, and that the said Hosford and Gagnon and each of them are now and were at the time of the bringing of this suit citizens of the State of Nebraska, and that your said petitioner is now and was at the time of the bringing of this suit citizens of the State of New York; and your petitioner further respectfully shows that they, the said plaintiffs, claim to recover in the summons and declaration petition in this suit against your petitioners the sum of twelve thousand dollars, and that the actual amount in controversy in this suit exceeds the sum of five hundred dollars, exclusive of costs; and your petitioner further represents that this suit is brought by the said plaintiffs to obtain and recover a judgment against your said petitioners upon a certain policy of insurance in the said declaration in this suit more particularly described, on account, as they allege, for their loss and damage by fire of a certain mill and machinery located at Rulo, in Richardson county, Nebraska, in July or August, 1883; and your petitioner further respectfully shows that this suit has not yet been tried, and that the March term, A. D. 1884, of said circuit court of said Richardson county is the term of said court at which said cause could be first tried, and that the said suit is still pending for trial and undetermined in the said district court of said Richardson county, and that your petitioner desires to remove this suit into the next circuit court of the United States to be held in the district of

the State of Nebraska, in the eighth judicial circuit, in provision of the law as contained in the act of Congress, approved March 3rd, A. D. 1875, entitled "An act to determine the jurisdiction of
32 circuit courts of the United States and to regulate the removal of causes from State courts, and other purposes."

And your petitioner is ready and willing to give good and sufficient security for its doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and it offers herewith its bond, executed by ——— ———, of the county of Richardson and State of Nebraska, as securities, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter into the next circuit court of the United States to be held in the district of Nebraska, in the eight circuit, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by said United States court if said court shall hold that said suit was wrongfully and improperly removed thereto, and doing such other appropriate acts as by the said act of Congress, approved March 3d, A. D. 1875, are required to be done upon the removal of a suit into the United States court, as good and sufficient security, according to the said provisions of law; and your petitioner therefore prays that the said bond may be accepted, and that the said suit may be removed into the next circuit court of the United States to be held in the district of Nebraska, in the eighth circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein by this court.

THE GERMANIA FIRE INSURANCE COMPANY AND
THE HANOVER FIRE INSURANCE COMPANY,
By FRED. W. MILLER, *Agent.*
THE GERMANIA FIRE INSURANCE COMPANY AND
THE HANOVER FIRE INSURANCE COMPANY,
By MARTIN & GILMAN, *Att'ys.*

33 STATE OF NEBRASKA, }
Richardson County, } *ss:*

I, Fred. W. Miller, being first duly sworn, say: I am the duly authorized agent of the Germania Fire Insurance Company and the Hanover Fire Insurance Company, at Falls City, Nebraska, and have power, as such agent in Richardson County, Nebraska, to do all acts connected with the business of said company at said agency in said county.

FRED. W. MILLER.

Subscribed in my presence and sworn to before me this 10th day of March, A. D. 1884.

[SEAL.]

CHAS. LOREE,
Clerk Dist. Court.

Filed March 10, 1884.

CHAS. LOREE, *Clerk.*

In the District Court in the 1st Judicial District of Nebraska, in and for Richardson County. March Term, A. D. 1884.

STATE OF NEBRASKA, *County of Richardson,* } *ss:*

JAMES W. HOSFORD & CHARLES GAGNON, Partners Doing Business under the Firm Name of Hosford & Gagnon,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER FIRE INSURANCE COMPANY.

We, The Germania Fire Insurance Company and The Hanover Fire Insurance Company, of New York city and State of New York, as principal, and Robert Clegg, of the county of Richardson and State of Nebraska, as securities, are held and firmly bound unto James W. Hosford and Charles Gagnon, partners as Hosford and Gagnon, jointly and severally, in the sum of five hundred dollars;
for the payment of which, well and truly to be made, we bind
34 ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this tenth (10th) day of March, A. D. 1884.

Whereas suit was brought, on or about the third day of November, A. D. 1883, in the district court of the county of Richardson, State of Nebraska, by the said James W. Hosford and Charles Gagnon, by the name, style, and description of Hosford & Gagnon, against the said Germania Fire Insurance Company and the Hanover Fire Insurance Company, and the same is now pending for trial and undetermined in the said district court of the said Richardson county, and is removable into the circuit court of the United States for the district of Nebraska, in the 8th circuit, under and by virtue of an act of Congress, approved March 3rd, A. D. 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;"

And whereas the said Germania Fire Insurance Company and the Hanover Fire Insurance Company is desirous of removing said suit to the said United States court and will shortly file its petition for that purpose: Now, therefore, the conditions of the above obligation are such that if the above-bounden Germania Fire Insurance Company and the Hanover Fire Insurance Company shall enter or cause to be entered in the circuit court of the United States for the district of the State of Nebraska, in the 8th circuit, a copy of the record in said suit on the first day of its next session, and pay or cause to be paid all the costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, and do or cause to be done such other appropriate acts as by said acts of Congress are required

to be done upon the removal of a suit into the United States
35 court, then this obligation to be null and void; otherwise to remain in full force and virtue.

THE GERMANIA FIRE INSURANCE COMPANY AND
THE HANOVER FIRE INSURANCE COMPANY,
By FRED. W. MILLER, *Agent.*
ROB'T CLEGG. [SEAL.]
THE GERMANIA FIRE INSURANCE COMPANY AND
THE HANOVER FIRE INSURANCE COMPANY,
By MARTIN & GILMAN, *Att'ys.* [SEAL.]

This bond and the surety thereto on this 10th day of March, 1884, duly approved by me.

[SEAL.] CHAS. DOREE, *Clerk.*

Filed March 10th, 1884.

CHAS. DOREE,
Clerk District Court.

STATE OF NEBRASKA, } *ss:*
Richardson County, }

I, Chas. Doree, clerk of district court in and for Richardson county, State of Nebraska, do hereby certify that the within is a true, correct, and complete transcript of all files and entries in case 1491, James W. Hosford and Charles Gagnon, copartners in business in the firm name of Hosford & Gagnon, *vs.* The Germania Fire Insurance Company and The Hanover Fire Insurance Company, an association of insurance companies associated together and doing business in the name and style of The Underwriters, and Israel May, as shown by the original files and records now in this office.

Witness my hand and the seal of said court this 22 day of April, 1884.

[SEAL.] CHAS. DOREE,
Clerk District Court.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 3. Appearance docket, page 482. Fee docket, No. 4, page 357. Civil action. General number,
36 1491. District court, Richardson county, Nebraska. James W. Hosford and Charles Gagnon, copartners in business in the firm name of Hosford & Gagnon, *vs.* The Germania Fire Insurance Company and The Hanover Fire Insurance Company, an association of insurance companies in the name and style of The Underwriters, and Israel May. Action for the recovery of money on account of insurance. Filed November 3rd, 1883. T. C. Cunningham, clerk. Reavis and Gillespie, attorneys for plaintiff. No. 310 H. Filed May 5, 1884. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 3rd day of February, 1885, the following proceedings were had and done in said case, as appears of record on folio 817, Journal "I" of said court, to wit:

Trial.

JAMES W. HOSFORD *et al.*

vs.

GERMANIA FIRE INSURANCE CO. *et al.*

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit, 1, Wm. H. Beach; 2, G. B. Hamilton; 3, George Crow; 4, L. J. Byers; 5, R. C. Manley; 6, Roderick McGrath; 7, Wm. Fenton; 8, J. A. Wagner; 9, W. I. Broyhill; 10, L. W. Coats; 11, John Sherman; 12, Edson Rich, who were duly empaneled and sworn according to law; and, the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning at ten o'clock.

37 Thereupon, afterwards, to wit, on the 5th day of February, 1885, amendment to answer was filed in said case, which said amendment to answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Partners Under the Firm Name of Hosford & Gagnon, Plaintiffs,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER FIRE Insurance Company, Under the Name of The Underwriters, Defendants.

Now come the above-named defendants, and, by leave of the court first had and obtained, as an amendment to the answer of the defendants filed herein, say that said plaintiffs should not recover of and from said defendants because before the time of the making of the policy of insurance sued on herein and as an inducement for these defendants to issue said policy said plaintiffs made the application attached to the answer herein and in said application in answer to the following question: "Is smoking or drinking of spirituous liquors allowed on the premises?" Said plaintiffs answered in writing in said application as follows: "No," and said defendants aver that the said answer was false, and that smoking was permitted by said plaintiffs continuously and engaged — by them on said premises from the time of making said application until the fire mentioned in plaintiffs' petition.

38 And said defendants further aver that in said application said plaintiffs covenanted and agreed to and with said defendants that said application is a just, true, and full exposition of all the facts and circumstances in regard to the condition, value, and risk of the property mentioned in said plaintiffs' petition, and that

said answers were considered the basis upon which the insurance in said petition mentioned was affected, and said application was understood and covenanted to be incorporated in and become a part of said policy of insurance, and that said plaintiffs would notify defendants of any change in the property mentioned on said insurance risk in the manner, to the extent, and for the purpose in said application mentioned; and said policy of insurance sued on herein provided that "any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise," and "all fraud or attempt at fraud or false swearing on the part of the assured shall cause a forfeiture of all claim under this (said) policy;" and that said application was not a just, true, and full exposition of all the facts and circumstances in regard to the condition, value, and risk of the property mentioned in said petition in this, that in said application said plaintiffs stated that said mill was only run and operated for the period of eighteen hours each day, when in truth and in fact said mill was run and operated for the period of twenty-four hours in each day when in operation, and that said plaintiffs have failed to make known every fact material to said risk, and also have been guilty of fraud and false swearing in their proofs of loss and a sworn examination in regard to the encumbrance on said property and in other particulars, by reason whereof said policy became and was void.

39 Wherefore defendants pray, as in their said answer, that they may be hence dismissed with their costs.

WOOLWORTH, KRETZINGER,
THURSTON & MARTIN,
Att'ys for Def'ts.

STATE OF NEBRASKA, }
District of Nebraska, Lancaster County, } *ss:*

Frank Martin, being first duly sworn, says he is the duly authorized attorney of said defendants; that he knows the contents of the foregoing amendment to the answer of said defendants and believes the same to be true.

F. MARTIN.

Subscribed in my presence and sworn to before me this 5th day of Feb'ry, A. D. 1885.

ELMER D. FRANK, *Clerk.*

Upon the back of said amendment to answer appear endorsements in words and figures following, to wit: No. 310. H. Hosford and Gagnon *vs.* Underwriters. Amendment to answer. Filed Feb'ry 5, 1885. Elmer D. Frank, clerk. Woolworth, Kretzinger, Thurston & Martin, def'ts' att'ys.

Thereupon, afterwards, to wit, on the 5th day of February, 1885, amended reply was filed in said case, which said amended reply is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Copartners in Business in the Firm Name of Hosford & Gagnon, Pl'ffs,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER Fire Insurance Company, an Association of Insurance Companies Associated Together and Doing Business in the Name and
40 Style of The Underwriters, and Israel May, Def'ts.

Plaintiffs' reply, as amended, by leave of court first had and obtained.

Now come the plaintiffs and for reply to the answer of the defendants filed herein say—

1st. They deny each and every allegation of new matter in said answer contained by which any cause or causes of defence is or are in any of the several paragraphs thereof sought to be set up.

2nd. That F. W. Miller, who was and is the agent of said defendants, made particular survey and examination of the property insured and which has since been destroyed by fire at the time the application for insurance was made by plaintiffs and was personally acquainted with the situation, condition, and value of said mill, machinery, elevator, and appointments and all the facts touching the risk so taken by defendants; and having made himself acquainted with said facts by a personal and careful inspection of said property, fully concurred with plaintiffs in their estimate of the value of said property and the character of the risk to be taken, and pronouncing the same first class in all respects the contract of insurance was made and the policy duly issued.

Plaintiffs deny each and every allegation of fraud and deceit in said answer contained; wherefore they pray judgment as they have heretofore prayed.

GILLESPIE & REAVIS,
Att'ys for Pl'ffs.

STATE OF NEBRASKA, }
District of Nebraska, } *ss:*

James W. Hosford, one of the plaintiffs, being duly sworn, on oath says that he is acquainted with the facts in the foregoing
41 reply and knows them to be true, and further saith not.

JAMES W. HOSFORD.

Sworn to before me and subscribed in my presence this 5th day of February, 1885.

ELMER D. FRANK, *Clerk.*

Upon the back of said amended reply appear endorsements in words and figures following, to wit: No. 310 H. Circuit court U. S., district of Nebraska. James W. Hosford *et al. vs.* Germania Fire Ins. Co. Amended reply. Filed Feb. 5, 1885. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 6th day of February, 1885, amended reply was filed in said case, which said reply is in words and figures following, to wit:

Reply of Plaintiffs.

In the Circuit Court of the United States, District of Nebraska.

JAMES HOSFORD & CHARLES GAGNON, Partners as Hosford & Gagnon, Plaintiffs,

vs.

THE GERMANIA INSURANCE COMPANY AND THE HANOVER INSURANCE COMPANY, Under the Name of The Underwriters, Def'ts.

Now come the plaintiffs, and for their reply to the answer and amendment to the answer of defendants say: Plaintiffs deny each and every allegation of new matter therein set up. They further deny that they ever stated or represented in the application for the said policy of insurance that their said mill was running or operated only eighteen hours a day, but they aver that in their answer to the question asked of them on that subject in said application they answered and stated that said mill was run and operated from six o'clock Monday morning till twelve o'clock Saturday night, and that the agent of the defendants who wrote out the said answer and who took the said application and procured said policy
42 for plaintiffs did not write their answer in that particular correctly or as given by plaintiffs, but by inadvertence, accident, mistake, or fraud he wrote in said application "from six o'clock a. m. till twelve p. m," an impossible time.

Said answers were written by the said agent of the defendants, and he took the application away with him as soon as he had written it out, and defendants have kept the same ever since, giving no copy thereof to plaintiffs, and plaintiffs never saw nor had an opportunity of seeing the same till long after the commencement of this action. Plaintiffs have only within the last few days discovered that their said statement about the time of running the mill was so incorrectly written in the application as aforesaid.

Plaintiffs, further replying to said answer and amended answer, allege that some time after the said fire and the loss occasioned thereby and after the proofs of loss had been furnished by plaintiffs to defendants, the defendants then, well knowing that they charged and claimed that plaintiffs had permitted smoking tobacco in said mill and that the mill had been running over eighteen hours per day continuously, called upon plaintiffs for additional proofs of loss, and required plaintiffs to appear and submit to an examination under oath in relation to said loss, which plaintiffs did at considerable trouble and expense; although defendants then knew

that the said alleged smoking and running over eighteen hours was charged, they did not state that ground of forfeiture, but fraudulently concealed that they had any such claim and misled and deceived plaintiffs, to their damage in trouble and expense. By their said action defendants are now precluded and estopped from claiming forfeiture of the policy on the said ground, and they have thereby waived any right to insist upon any such ground of forfeiture, if any such ever existed, which, however, plaintiffs deny.

43 THOMAS, MARQUETT,
REAVIS & GILLESPIE,
Atty's for Pl'ffs.

STATE OF NEBRASKA, }
District of Nebraska, County of Lancaster, } *ss:*

I, Jas. W. Hosford, being first duly sworn, depose and say that I am one of the plaintiffs in the above-entitled cause, and that the above allegations in this reply set forth are true as I believe.

JAMES W. HOSFORD.

Subscribed and sworn to before me on this 6th day of February A. D. 1885.

ELMER D. FRANK, *Clerk.*

Upon the back of said amended reply appear endorsements in words and figures following, to wit: No. 310, Doc. H. Hosford & Gagnon *vs.* The Underwriters. Amended reply. Filed Feb. 6, 1885. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 7th day of February, 1885, the following proceedings were had and done in said case, as appears of record on folio 833, Journal "I" of said court, to wit:

Cause Submitted to Jury & Special Verdict.

JAMES W. HOSFORD *et al.*

vs.

GERMANIA FIRE INSURANCE COMPANY *et al.*

On this day again come the parties hereto, by their attorneys; also came the jury empaneled and sworn herein, and thereupon, after hearing the remaining evidence, the argument of counsel, and charge of the court, said jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

And now come said jury into open court and present to the court their special verdict, which is in words and figures following, to wit:

43½ In the Circuit Court of the United States for the District of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Partners as Hosford & Gagnon, Pl'ffs,

vs.

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER Fire Insurance Company, an Association of Insurance Companies Associated Together and Doing Business in the Name and Style of the Underwriters, and Israel May, Defendants.

We, the jury, having been first duly empaneled and sworn to well and truly try the issue joined herein and a true verdict render according to the evidence, do find under the pleadings and the proofs offered in support thereof, and, by direction of the court, specially as follows, to wit:

44 First. That the four-story brick-and-stone metal-roof mill building and two-story frame metal-roof addition known as the Rulo City Mills, fixed and movable machinery, shafting, gearing, and belting contained in said mill; the frame with stone basements, metal-roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith; the gearing, belting, scales, corn-sheller, fanning-mill, and other machinery contained in said elevator, situated on lots five (5) and six (6), in — five (5), in Rulo, Richardson county, Nebraska, as described in and covered by policy No. 20157, issued by the defendants herein in favor of the plaintiffs herein, was destroyed by fire on the first day of August, A. D. 1883, and that at that time the said property was worth the sum of $19,000.00, and that the value of the property so destroyed and the loss of the plaintiffs thereby was the sum of $18,500.00.

2nd. We find that at the time of said destruction by fire the said four-story brick-and-stone metal-roof mill building and two-story frame metal-roof addition, known as the Rulo City Mills, was worth the sum of $5,000.00, and that plaintiffs' loss on that item was the sum of $5,000.00.

3rd. We find that at the time of said destruction by fire of the fixed and movable machinery, shafting, gearing, and belting contained therein was worth the sum of $9,800.00, and that plaintiffs' loss on that item was the sum of $9,300.00.

4th. We find that at the time of said destruction by fire the said frame with stone basement, metal-roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith, was worth the sum of $3,000.00, and that plaintiffs' loss on that item was the sum of $3,000.00.

45 5th. We find that at the time of said destruction by fire the said gearing, belting, scales, corn-sheller, fanning-mill, and

other machinery contained in said elevator, as described in said policy No. 20157, was worth the sum of $1,200.00, and that plaintiffs' loss on that item was the sum of $1,200.00.

We find that the plaintiffs in their application did not overestimate the value of the property insured, or any of the different classes thereof separately insured; that plaintiffs did not in their application fraudulently or intentionally overestimate the value of the property insured; that plaintiffs did not in their application for the policy misstate the time when said mill was built; that in the said application plaintiffs did not intentionally misstate the time when said mill was built; that plaintiffs forbid smoking to go on in the mill, but smoking was done on the grinding floor; that the statements in the application about water for extinguishing fire being in the mill were substantially true; that the water provided by plaintiffs in the mill was as convenient and accessible for the purpose of extinguishing fires as if there had been a barrel or cask on each floor; that the water provided by plaintiff in the mill was better fitted for extinguishing fires than if there had been only an ordinary cask of water in each floor; that plaintiffs in their application did not represent that the mill ran only 18 hours a day; that the mill did not stop running or lie idle for 10 days or more at any one time, or for ten days consecutively; that plaintiffs in their application did not misrepresent the amount of encumbrances or liens on said premises; that the plaintiffs did not in their application fraudulently or intentionally misrepresent the amount of incumbrances or liens on said premises.

46 That there is now due Israel May on his notes and mortgage on said premises the sum of $3,406.15, and was due at the time of the application $3,079.45; that the said plaintiffs made to the defendants an application in writing for the insurance of the property mentioned in the plaintiffs' petition, and said application was in the words and figures of Exhibit "A," hereto annexed and made a part hereof; that one of them himself smoked upon and in the said mill insured by the defendant.

The said mill was run and operated by the plaintiffs at several different times and for long periods of time continuously—twenty-four hours in each day—and plaintiffs did not inform said defendants of the fact at the time of the issue of said policy, and at time of fire the actual value of said mill was $5,000.00 and no more, and of the machinery therein was $9,800 and no more, and of the elevator building $3,000.00 and no more, & of the elevator machinery $1,200.00 & no more; that there were taxes of the county and State on said premises for several years prior to the issue of the policy which were delinquent and unpaid, and still remain unpaid, amounting to the sum of $329.40 on the 14 day of May, 188–.

In their written statements to Gould, the agent of the defendants, shortly after the fire, Hosford and Gagnon made several important statements about the value and condition of the property, in which one contradicted the other, and said statements appear from the evidence adduced on the trial to have been incorrect.

There was not a barrel of water with buckets on any floor of the mill except one, but there was a large tank of water in the adjoining building.

When the policy was issued the incumbrance upon the
47 premises by way of May's mortgage exceeded ($3,000) three thousand dollars. This application is to be forwarded to A. Stoddard, general agent, for approval before any insurance is made binding.

No. 20157. $8,000.

NEW YORK UNDERWRITERS' AGENCY,
No. 175 BROADWAY.

The estimated value of personal property and of each building to be insured and the sum to be insured on each must be stated separately.

Application of Hosford & Gagnon, of Rulo, in the county of Richardson and State of Nebraska, for insurance against loss or damage by fire by the Germania and Hanover Fire Insurance Companies in the sum of eight thousand dollars (one-half of said sum to be insured by each of the above-named companies on the property specified), the value of the property being estimated by the applicant.

On mill and elevator buildings.	Valuation.	Sum to be ins.	Rate.
On mill, $1,500	$7,000	$3,000	4%
On elevator, $1,500			
In mill, $4,500			
In elevator, $500			
On machinery, gearing, shafting, and fixtures (exclusive of boiler & engine)	$1,100	$5,000	4%

The applicant will answer particularly the following questions, and sign the same, as descriptive of the premises and forming a part of the contract of insurance and a warranty on his part:

What is the name of the mill or elevator?

Rulo City mills and elevator.

How far is the mill located from the place at which this application is made?

10 miles.

Is the property now insured? If so, state companies and rate paid?

None.

Is it a flouring mill or grist-mill for custom only?

Flouring.

48 Has the mill ever been remodeled or rebuilt; if so, when, what addition and improvements made, and what new machinery introduced?

Yes; changed boilers, built conveyers and elevators.

Is the building of stone, brick, or wood? When was it built?

Stone, brick, & wood; 1879, 1880, 1882.

Is it on leased ground? When does lease expire?

No.

Of what material is the roof?

Metal.

If frame, has it an outside covering of slate or iron?

No.

Size and number of stories high?

Mill, 4, 30 x 40; flour or ware room, 2, 16 x 40; elevators, 26 x 38 and 20 by 24.

How high between the joists?

9, 12, 14; attic.

Is the frame-work substantial, so that the shafting runs true?

Yes.

Has any part of the mill settled or sagged? If so, state all about it particularly.

No.

Is the building kept clear of rubbish, refuse, and cobwebs? Do you agree to keep it in good condition?

Yes.

Is motive power water or steam?

Steam.

If propelled by steam power, where is the engine and boiler located? Is the engine-house of stone, brick, or wood between mill and elevator?

——.

Is the boiler a single or return flue boiler?

Return.

How thick are the walls enclosing the boiler?

18 inches.

With what is top of boiler covered?

Brick.

Give the exact distance of the boiler walls from the wood-work over head and on the sides?

Over head, 5 ft.; stone wall on sides.

Is a careful and competent engineer constantly employed and does he attend to any other duty when the engine is in use?

Yes; no.

What materials are used for fuel for steam boiler, for stoves?

Coal, wood, and cobs; wood.

49 How many feet from mouth of furnace to the place where the daily supply of fuel is kept?

10 ft.

How far from furnace door to wooden floor or wooden walls?

None.

Is the boiler chimney in the building; if not, where is it? (Show the location on the diagram.)

Yes.

How high is it, and does it rise above the peak of the roof, and how far?

18 ft. above peak.

Is it of brick or iron?

Iron.

Do the floors or floor timbers or roof or other wood-work come in contact with it? If not, give the exact space that intervenes.

6 inches.

If the chimney is of iron is it in good condition, perfectly sound, securely braced?

Yes.

How many feet from any wood-work, and how protected?

6 in. from roof boards; by metal covering.

How many stoves are in the building and adjoining premises?

2.

What kind and where situated?

Wood; 1 in mill and 1 in office.

Are they sound and in good order? What is under them?

Yes; zinc.

How far from any partition or wood-work?

Safe distance.

Is the fuel ever piled under or near the stove?

No.

How are the ashes disposed of?

Safe distance.

Will you agree that they shall not be deposited in wooden vessels in the building, and that they shall be duly and carefully removed to safe distance from the premises?

Yes.

How many feet of stovepipe are used? Is it in good order and well secured?

10 ft.; yes.

Do the stovepipes enter the chimney perpendicularly or horizontally?

Horizontally.

Do any of them pass through a partition or floor?

No.

Do any of them pass out of the building without entering the chimney?

No.

50 Do the pipes enter brick chimneys; if so, are the chimneys built from the ground; if not from the ground, from which floor, and do they rise above the peak of the roof, and how far?

Yes; in mill and below ceiling in office.

On which floor is smut machine located?

Ground.

Is it entirely of iron; whose pattern is it?

Wood frame; California.

Is the lower box kept constantly supplied with oil or tallow?

Yes.

How many revolutions does it make per minute?

650.

What portion of the time is it in operation?

¼.

Can it readily be flooded by flume or by hose?

No.

Is the smut blown out of the building by the machine, or allowed to accumulate?

Blown out.

How often have you heretofore removed the accumulated smut from under the machine and from the room?

Does not accumulate.

Do you agree to clean it out carefully every day during the period of this insurance?

Yes.

How many run of burr stone, what diameter, and for what work used?

5–4, 42 in.; wheat. 1, 20 in.; corn.

How long has each run been in use?

4, 3 years; 1, 2 years.

How many pairs of rollers?

None.

How many middlings purifiers?

2.

Is mill furnished with asperators and Sturtevant fans?

No.

Is there a bran duster or seperator in the mill, and where is it located?

Yes; upper floor.

How many revolutions does it make per minute?

275.

Does any part of the machinery or shafting of the mill run in wooden boxes? (Specify fully.)

No.

Do all parts of the machinery run cool?

Yes.

What part has tendency to undue heat?

None.

What material is used for lubricating or oiling the bearings and machinery?

Tallow, lard, and machine oils.

Will you agree to use only lard and tallow or sperm and
51 lard oils lubricating?

Lard and tallow or lard & machine oils.

Is the machinery regularly oiled, and by whom?

Yes; by regular attendant.

Will you agree to keep all the bearing and machinery properly supplied with oils?

Yes.

Is there a watchman in the building during the night time?

No.

Has fire ever occurred in the mill?

No.

Is there a good force-pump on the premises expressly for putting out fire, in condition at all times for use?

No.

Are there casks of water in each loft constantly filled ready for use?

Yes.

How many buckets for each cask used for no other purpose?

2.

During what hours does the mill run?

6 a. m. to 12 p. m.

Is it now in active operation?

Yes.

At what time during the year is it closed?

Nights only.

Is corn-shelling, meal-drying, elevating, saw-mill, or any other business carried on in the building or near it?

Corn-sheller in elevator.

Are middlings stored in mill; what is the largest quantity kept on hand at any one time?

Yes; not to exceed 3½ tons.

What material is used for lighting the building?

Kerosene.

Are open or unprotected lights ever used?

No.

Are friction matches kept in the building; if so, in what manner?

Yes; in desk in office.

Is smoking or drinking of spirituous liquors allowed on the premises?

No.

Is the ground, mill, machinery, and stock in the mill allowed exclusively by the applicant for this insurance?

Yes.

Is the mill operated exclusively on account of the proprietors or under contract?

Proprietors.

How many hands are employed in the mill?

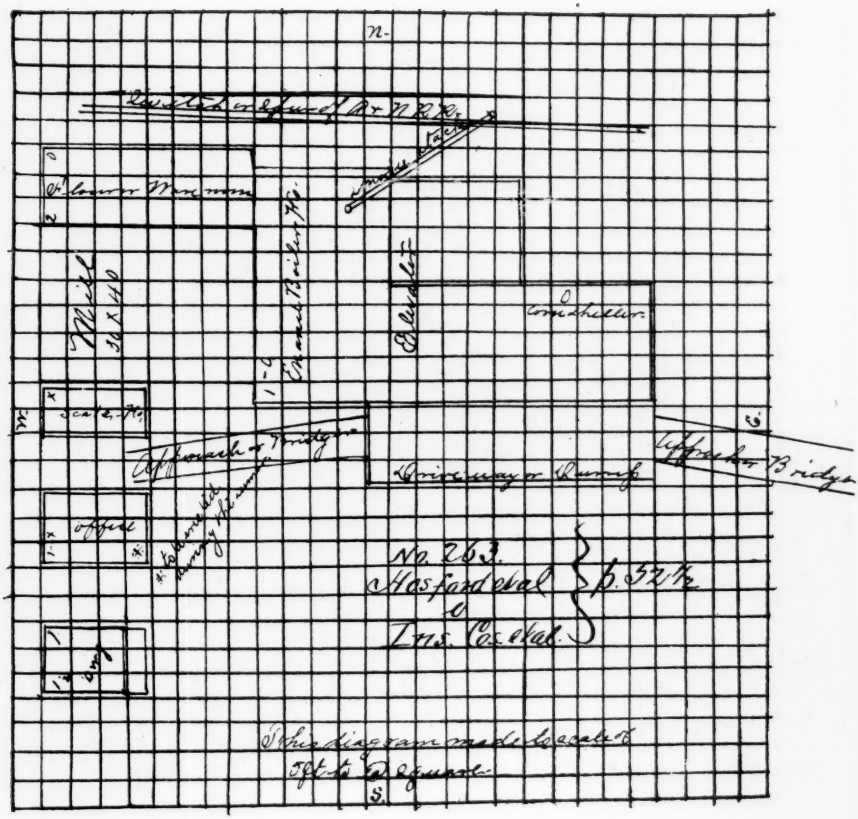
7.

What is the present cash value of the building to be insured,
52 including only the destructible portion above the foundation, mill gearing, machinery and fixtures, engine and boilers?

Building, $7,000; mill and elevator, gearing, machinery, and fixtures, $11,000.

What is the average value of grain and flour in the mill? State each separately.

Grain, $2,500; flour, $800.


N.
Road to Edmund's Ferry
Edmund's Ferry Rd
Blacksmith Shop
Store
Mill
36 x 40
Scale
Office
Approach to Bridge
Driveway or Runway
Bridge
No. 263
Hasford Val
&
Dms. Co. Val.
p. 52½
Sketch diagram made to scale of
50 ft to the Square.

Is there any insurance on the property?

Yes.

If mortgaged, state the amount.

$3,000.

Is there any insurance by the mortgagee?

Yes.

What amount is insured on the property, building, mill gearing, machinery and fixtures, engines and boiler, and stock, separately?

Buildings, $4,500; mill gearing, machinery, and fixtures, $7,500.

Does all the insurance attach on each subject exactly as applied for herein?

Yes.

In what offices and on whose account? Specify particularly.

Hartford, $4,000; underwriters, $8,000.

Have you any reason to believe that your property is in danger from incendiarism from any cause whatever?

No.

To what extent has the mill been a profitable investment to the applicant during the past three years? Answer fully.

15 per cent. per annum on the total investment.

Is the mill likely to continue to be a profitable investment during the period of the insurance applied for?

Yes.

The subscriber requests insurance against fire by the Germania and Hanover Fire Insurance Companies of New York on the foregoing described property, and hereby covenants and agrees to and with the said companies that the same is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, and said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in and forming a part and parcel of the policy, and further covenants and agrees that if the situation or circumstances affecting the risk shall be so altered or changed during the time of any policy of insurance which may be fixed upon the application or any renewal of said policy as to render the risk more hazardous, will notify the officers of said companies or their general agent forthwith of such alteration.

52½

The survey in all cases to be signed by applicant.

Dated at Rulo, Nebr., this 14th day of May, 1883.

HOSFORD & GAGNON,
Applicant.

Diagram.

NOTE.—Annex a ground plan of the premises; also a diagram of all buildings within 150 feet, with description of size, of what built, and occupancy. Make scale about ten feet to the square. Brick or stone designated by red, wooden buildings by black lines.

(Here follows diagram marked p. 52½.)

53 If, upon the pleadings and the foregoing facts, the court shall be of the opinion that the plaintiffs are entitled to judgment the sum which they ought to recover amounts to $8,320.00, and we therefore find for the plaintiffs and assess their damages at the said sum of $8,320.00 against the underwriters.

EDSON RICH, *Foreman.*

Thereupon afterwards, to wit, on the 11th day of February, 1885, motions for judgment were filed in said case, which said motions for judgment are in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Partners as Hosford & Gagnon, Plaintiffs,

vs.

THE GERMANIA & HANOVER INSURANCE COMPANIES, as The Underwriters, Defendants.

Now come the above-named defendants and move the court to enter judgment in this cause in favor of said defendants upon the evidence of the jury heretofore entered herein.

WOOLWORTH, THURSTON,
KRETZINGER AND MARTIN,
Att'ys for Def'ts.

Upon the back of said motion for judgment appear endorsements in words and figures following, to wit: No. 310 H. Hosford & Gagnon *vs.* Germania Ins. Co. & Hanover Ins. Co., as The Underwriters. Motion for judgment. Filed Feb. 11, 1885. Elmer D. Frank, clerk. Woolworth, Thurston, Kretzinger & Martin, def'ts' att'ys.

Motion.

In the Circuit Court of the United States, District of Nebraska.

JAMES W. HOSFORD & CHARLES GAGNON, Partners as Hosford & Gagnon, Plaintiffs,

54 *vs.*

THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER Fire Insurance Company, an Association of Insurance Companies Associated Together and Doing Business in the Name and Style of Underwriters, and Israel May, Defendants.

Now come the above-named plaintiffs in the above-entitled case, by their attorneys, and move the court to enter judgment in favor of plaintiffs upon the findings of the jury.

That by said findings plaintiffs are entitled to judgment in the sum of $8,320.

T. M. MARQUETT,
Att'y for Pl'ffs.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 310 H. U. S. circuit court, dist. Ne-

braska. Hosford & Gagnon *vs.* Germania Ins. Co. & Hanover Ins. Co., asso. under name of Underwriters. Motion. Filed Feb. 11, 1885. Elmer D. Frank, clerk. T. M. Marquett, att'y pl'ffs.

Thereupon afterwards, at the May term of said court, on the 2nd day of July, 1885, the following proceedings were had and done in said case, as appears of record on folio —, Journal "K," of said court, to wit:

Judgment.

JAMES W. HOSFORD and CHARLES GAGNON
vs.
THE GERMANIA FIRE INSURANCE COMPANY AND THE HANOVER FIRE INSURANCE COMPANY. } 310 H.

This cause came on *the* be heard before the circuit judge and the district judge upon the several motions of the parties for judgment upon the special verdict heretofore rendered therein, and the circuit judge being of the opinion that the said judgment should be for the defendants, and the district judge being of the opinion
55 that the judgment should be for the plaintiffs, it is thereupon ordered, considered, and adjudged that the petition herein be dismissed, and that the defendants have and recover of and against the plaintiffs their costs of this action, to be taxed by the clerk; and thereupon the said judges, being divided in opinion as aforesaid, signed their certificates in that behalf for the decision of the Supreme Court of the United States upon the points of difference between them.

Thereupon afterwards, to wit, on the said 2nd day of July, 1885, certificate of division was filed in said case, which said certificate of division is in words and figures following, to wit:

JAMES W. HOSFORD and CHARLES GAGNON, Partners as Hosford & Gagnon, Pl'ffs,
vs.
THE GERMANIA FIRE INSURANCE COMPANY AND THE Hanover Fire Insurance Company, an Association of Insurance Companies Associated Together and Doing Business in the Name and Style of The "Underwriters," and Israel May, Def'ts. } 310 H.

Upon the consideration of the verdict and special findings of the jury returned herein, final judgment having been rendered thereon for the defendants, the opinion of the judges holding said court, namely, the circuit judge and the district judge, were opposed upon the following questions thereon arising, to wit:

1st. Whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

2nd. Whether the fact that delinquent taxes on the mill, to
56 the amount of $329.40, were due and unpaid at the time the application for insurance on the property destroyed was made,

and that fact was not disclosed by the applicants to the insurers, will defeat the plaintiffs' right to recover.

3d. Whether the fact that smoking was done in the mill, the proprietor of the mill being one that smoked, notwithstanding the plaintiffs had stated in their application for insurance that smoking was forbid therein, will defeat their right to recover, the fire that destroyed the property not having originated from that cause.

And the said points being at the time stated under the direction of the said judges, it is ordered that the said points be, and they are, certified to the Supreme Court of the United States according to the statute in such case provided.

DAVID J. BREWER,
Circuit Judge.
ELMER S. DUNDY,
District Judge.

Upon the back of said certificate of division appear endorsements in words and figures following, to wit: No. 310 H. United States circuit court, district of Nebraska. James W. Hosford *et. al. vs.* Germania Fire Insurance Co. Certificate of division. Filed July 2, 1885. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on said 2nd day of July, 1885, a writ of error was allowed and a citation issued in said case, of which the following are the originals:

57 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between James W. Hosford and Charles Gagnon, copartners in business under the firm name of Hosford & Gagnon, plaintiffs, and The Germania Fire Insurance Company and The Hanover Fire Insurance Company, associated together under the name of The Underwriters, defendant, a manifest error hath happened, to the great damage of the said plaintiffs in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 2nd day of July, 1885.

ELMER D. FRANK, *Clerk.*

Allowed by—
DAVID J. BREWER,
Circuit Judge.

[Endorsed:] No. 310 H. United States circuit court, district of Nebraska. James W. Hosford *et al.*, pl'ffs in error, *vs.* Germania Fire Insurance Company *et al.*, def'ts in error. Writ of error. Filed July 2, 1885. Elmer D. Frank, clerk.

58 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To the Germania Fire Insurance Company and the Hanover Fire Insurance Company, associated together under the name of The Underwriters, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein James W. Hosford *et al.* are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 2nd day of July, 1885.

DAVID J. BREWER,
Circuit Judge.

58½ [Endorsed:] No. 310 H. United States circuit court, district of Nebraska. James W. Hosford *et al.*, pl'ffs in error, *vs.* Germania Fire Insurance Co. *et al.*, def'ts in error. Citation. Filed July 2, 1885, Elmer D. Frank, clerk.

Service of within citation omitted this 7th July, 1885.

J. M. WOOLWORTH,
Att'y for Def't.

59 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios from one to — contain true and faithful transcripts from the records and files of said court in the case of James W. Hosford *et al. vs.* The Germania Fire Insurance Company and The Hanover Fire Insurance Company, and that a copy of the writ of error and citation has been lodged and remains in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 22nd day of July, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 263. James W. Hosford and Charles Gagnon, copartners under the firm name of Hosford & Gagnon, plaintiffs in error, *vs.* The Germania Fire Insurance Company and The Hanover Fire Insurance Company, associated together under the name of The Underwriters. Filed August 3, 1885.

224-599

FILED
APR 10 1893
CLERK

IN THE

Supreme Court of the United States.

JAMES F. HOSFORD AND CHARLES GAGNON,
CO-PARTNERS UNDER THE FIRM NAME OF
HOSFORD & GAGNON,
Plaintiffs,

vs.

GERMANIA FIRE INSURANCE CO. AND THE HANOVER INSURANCE CO., ASSOCIATED TOGETHER UNDER THE NAME OF THE UNDERWRITERS.

BRIEF OF PLAINTIFFS IN ERROR.

T. M. MARQUETT,
ISHAM REAVIS,
Attorneys for Plaintiffs in Error.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 22nd day of July, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 263. James W. Hosford and Charles Gagnon, copartners under the firm name of Hosford & Gagnon, plaintiffs in error, *vs.* The Germania Fire Insurance Company and The Hanover Fire Insurance Company, associated together under the name of The Underwriters. Filed August 3, 1885.

IN THE

Supreme Court of the United States.

JAMES F. HOSFORD AND CHARLES GAGNON,
CO-PARTNERS UNDER THE FIRM NAME OF
HOSFORD & GAGNON,
Plaintiffs,

vs.

GERMANIA FIRE INSURANCE CO. AND THE HANOVER INSURANCE CO., ASSOCIATED TOGETHER UNDER THE NAME OF THE UNDERWRITERS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES W. HOSFORD, AND CHAS. GAGNON, CO-PARTNERS UNDER THE FIRM NAME OF HOSFORD & GAGNON,

Plaintiffs.

VS.

GERMANIA FIRE INSURANCE CO. AND THE HANOVER INSURANCE CO., ASSOCIATED TOGETHER UNDER THE NAME OF THE UNDERWRITERS.

POINT FIRST.

This is a case sent to this court on a certificate of division between the circuit and district judges in and for the district of Nebraska.

There are three points of difference, which are as follows:

1st. Whether the plaintiffs or the defendant insurance companies are entitled in law to recover judgment on said verdict and special findings of the jury returned in said case.

The findings of the jury on the issues made by the answer were in favor of the plaintiffs, except those which are specially

referred to in the second and third points of difference certified to this court; unless it be the issue in the answer, to-wit, that the mortgage upon said property was represented only amounting to $3,000, or also in their written statement to Gould, the agent of the defendant, shortly after the fire, Hosford & Gagnon gave several important statements about the value and condition of the property, in which one contradicted the other, and that said statements appear to be incorrect.

I.

AMOUNT OF MORTGAGE.

The question is, "If mortgaged, state the amount." This is seen at once to be a plain question. Its most natural import is an inquiry, have you heretofore mortgaged the property, if so, to what amount, and the answer would be the amount stated in the mortgage, not including any interest that might afterwards accrue, and that is just what the answer was. Now the jury finding in reference to that is as follows:

1st. That plaintiffs in their application did not misrepresent the amount of incumbrance or liens on said premises.

2d. That the plaintiffs did not in their application fraudulently or intentionally misrepresent the amount of incumbrance or liens on said premises.

3d. That there is now due Israel May on his notes and mortgage on said premises the sum of $3,406.15, and was due at the time of the application, $3,079.44.

But the question is not what was the amount due on the mortgage at the time of the application, but what the mortgage was originally given for, and the finding of the jury is, that he states

correctly the amount for which it is mortgaged; but does not state in full the amount due of accrued interest at the time the application is made. Putting this construction upon it, the answer is literally true.

We think in order to harmonize the different findings in reference to the amount of the mortgage, that the jury understood the question, "If mortgaged, state the amount," to refer to the amount of the mortgage without any interest upon it, and when they said that there was due at the time the application was made $75.45 more than that amount, they simply meant that so much interest had accrued upon it, and that the question simply had reference to the amount for which the plaintiff mortgaged it. This construction harmonizes with and gives sense to the findings; otherwise the findings are so contradictory that if not construed in this way, no court ought to forfeit an insurance policy based upon such contradictory findings. But this principle likewise is laid down in Wood on Fire Insurance: "We do not suppose entire precision is requisite in such a statement, or that an omission to state a small amount of accumulated interest would avoid the policy."

Wood on Fire Insurance, 304, Sec. 158.

In fact it is not supposed that in a mere off-hand question that anybody can tell exactly the amount of the mortgage that is due upon his property, or could tell the precise amount of the accumulated interest.

II.

THE AMOUNT OF THE MORTGAGE NOT A WARRANTY, BUT A REPRESENTATION.

It is true that the policy contains the following: "The application, survey, plan, and description of the property herein in-

sured shall be considered a part of the contract and a warranty by the assured, and any false representations by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or any over-valuation or misrepresentation whatever."

We note here that it is "any false statement" as to the condition of this property. This changes the warranty to a representation, and if substantially true it is all that is necessary.

Continental Life Ins. Co. vs. Rogers, 119 Ill., 482.
Fitch vs. Ins. Co., 55 N. Y., 557.

III.

There is another finding in which it is said that the proprietors, Hosford & Gagnon, made several important statements about the value and condition of the property, in which one contradicted the other, and said statements appear from the evidence adduced on the trial to have been incorrect. This refers more especially to the value of the property, and after the property was burned. They did not agree exactly upon the value. As scarcely any two persons will agree upon the value of real estate or the value of personal property, it could hardly be expected that their statements would be the same. In fact if they had stated exactly alike as to the value, it would have been a sign that their statements were connived, or made up between themselves. There was some difference about the amount of wheat or flour on hand at the time, but this could easily happen. We do not think there is anything in that finding to prevent a judgment.

Wood on Fire Ins., page 425.
Franklin Fire Ins. vs. Vaughn, 92 U. S., 516.

The finding in reference to water is, that the statements in the application about water for extinguishing fire being in the mill were substantially true, and that the water provided by plaintiffs in the mill was as convenient and accessible for the purpose of extinguishing fire as if there had been a barrel or cask on each floor, and that the water provided by the plaintiffs in the mill was better fitted to extinguish fires than if there had been only an ordinary cask of water on each floor. Showing that, as far as water was concerned, the mill was better fixed than what they said it was.

Wood on Fire Ins., page 321.
Aurora Fire Ins. Co. vs. Eddy, 50 Ill., 106.

SECOND POINT.

On the second point of difference, whether the fact that delinquent taxes on the mill to the amount of $329 were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicant to the insurers, will defeat the plaintiffs' right to recover.

I.

Suffice to say on this point, that the answer made no issue whatever. In Nebraska we have the code pleadings, and under our pleadings all special matters of defense must be pleaded. Maxwell in his Pleadings and Practice says: "Under the code all affirmative matters of defense, such as warranty, representations, concealments, etc., must be pleaded. The tendency of the courts at the present time is to construe policies of insurance so as to sustain them if possible, when the insured has not been guilty of bad faith or fraud."

Maxwell's Pleadings and Practice, 144.
McMaster v. Ins. Co., 55 N. Y., 22.
Abbott's Trial and Evidence, 483.
Connecticut Mut. Life Ins. Co. v. Suchs, 108 U. S., 509.

II.

The question asked about the amount of incumbrance was simply, "If mortgaged, state the amount." Now this is the only question which would call in any way for the amount of incumbrance, and this calls for it in such a way as to lead the assured to believe that the amount of other incumbrances need not be given. Now these questions are made the basis of this policy, and the defense that the amount of taxes was not given has no basis to rest upon.

III.

He is asked, "If mortgaged, state the amount," and he states the amount of the mortgage. Now this answer is not *prima facie* a complete answer to whether there are any incumbrances or not, and it puts the insurer upon further inquiry, and if he issues a policy without eliciting or seeking to elicit further information in regard thereto, he waives a fuller answer, and cannot avoid liability upon the ground that the assured has concealed material facts. He takes the application and the answer as made there, and assents to take the risk with an imperfect knowledge of the amount of incumbrances, and thereby assumes all the consequences incident to his negligence in that risk.

Phœnix Life Ins. Co. v. Baldwin, 120 U. S., 190.
Connecticut Ins. Co. v. Lux, 108 U. S., 498.
Hall v. People's Ins. Co., 6 Gray, 185.

Lorillard's Ins. Co. v. McCullogh, 21 Ohio St., 176.
American Ins. Co. v. Mahone, 56 Miss., 180.
Carson v. Jersey City Ins. Co., 14 Vroom, 300.
15 Vroom, 210.
Lebanon Ins. Co., v. Kepler, 106 Pa., 28.

IV.

The question asked first is, "If mortgaged, state the amount." "$3,000; I. May."

The question that asks the amount and in whose favor, evidently refers to incumbrances created by the insured, and has no application to those created by the operation of law, such as taxes, because the question is a double one. What is the amount, and what person holds the lien? This would call the mind of the insurer to the liens that he himself had given, but would not call to the mind tax liens, because he is required to give the amount of the lien and to whom it was given—who holds it. The question is misleading, if it intended to cover taxes or liens created by law.

Bailey v. Homestead Fire Ins. Co., 80 N. Y., 21.
36 Am. and Eng. Reports, 571.

This more fully appears when we take into consideration the situation of the parties.

No man can know on May 14th, or in May at any time, what his lien or incumbrance for taxes is. The lien dates every year from the first of April, yet the assessment is not perfected till the last of July.

The Compiled Statutes of Nebraska, 1887, page 611, Sec. 138, reads as follows: "All taxes assessed on real property shall be a lien thereon from and including the 1st day of April in the year in which they are levied until the same are paid."

The board of equalization is not held until the first Tuesday after the second Monday in June. They usually sit some three weeks, and then levy the tax.

Compiled Statutes, 1887, page 596, Sec. 70.

The state board of equalization meets on the third Monday in July, and then levies the tax.

Compiled Statutes, 1887, page 598, Sec. 74.

So the assessment process and levy is not completed until the third Monday in July.

No one knows what the lien of his taxes is until six months after they become a lien upon his real estate in Nebraska, and if the policies of insurance in Nebraska depended upon an applicant for insurance stating correctly the amount of the tax lien upon his property, there would scarcely be a good policy in Nebraska—none whose application dated in April, May, June, July, August, or September.

THIRD POINT.

I.

SMOKING.

Whether the fact that smoking was done in the mill, one of the proprietors being one that smoked, notwithstanding that plaintiffs had stated in their application for insurance that smok-

ing was forbid thereon, will defeat their right to recover, the fire that destroyed the property not having originated from that cause.

The jury make two findings in this respect:

1st. That the plaintiffs forbid smoking to go on in the mill, but smoking was done on the grinding floor.

2d. That one of them himself smoked upon and in said mill insured by defendants.

1st. The question asked was this:

Is smoking or drinking of spirituous liquors allowed on the premises? No.

The answer probably is literally true. There was no smoking allowed upon the premises, the proof showing that printed notices were put up on the walls around the building forbidding any one from smoking; but the very fact that smoking was done on the grinding floor we do not think sufficient to nullity this policy. Things that are not allowed to be done on premises or in mills are frequently done notwithstanding, and that seems to be the finding of the jury in the first instance, that whilst it was forbidden, there was some little of it done; yet it had nothing to do with the risk.

Union Fire Ins. Co. v. Eddy, 55 Ill., 213–219.
Ins. Co. of North America v. McDowell, 50 Ill., 121.
Wood on Fire Insurance, 321, Sec. 168.

If the answer in the application in reference to smoking should be regarded as a warranty, it should be regarded merely as a warranty *in presenti*.

Aurora Fire Ins. Co., 55 Ill., 213.
3 N. Y., 122.
32 N. Y., 399.

A policy should be construed most strongly against the insurer. Where there is an honest doubt it should be solved in favor of upholding the policy.

National Bank vs. Ins. Co., 95 U. S., 673.
Menter vs. American Life Ins. Co., 111 U. S., 335.
Olson vs. St. Paul & M. Ins. Co., 29 N. W., 125.

II.

Looking at the application, we find no language which by fair construction was notice to the assured that in answering questions he was assuming or was expected to assume the strict obligations which the law attaches to a warranty. What he did covenant was this, that the answers to the questions were a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured. This is a mere covenant of good faith on the part of the assured, and the findings are to the effect that plaintiffs forbid smoking to go on in the mill, but smoking was done on the grinding floor. The whole findings, based upon the application and questions, is to show good faith in the assured. In a similar case to this, where the application is almost word for word the same as in this case, the court say: "It was a covenant of good faith on the part of the insured, nothing more, and so far as it relates to the value of the property, was not broken unless the estimates by the assured were intentionally excessive."

So we say here, in reference to smoking, the covenant was

good faith, nothing more, and so far as it related to the smoking, was not broken unless the assured intentionally allowed it to go on there.

The tenor of the whole finding is equivalent to saying that the assured did not withhold any material fact within his knowledge concerning the condition, situation, value, or risk of the property.

National Bank vs. Ins. Co., 95 U. S., 676.
Continental Life Ins. Co. vs. Rogers, 119 Ill., 482.
Fitch vs. Ins. Co., 55 N. Y., 557.

The findings show that the answer in reference to smoking was substantially true.

It is true that the application, survey, or plan of the property was considered a part of the contract and a warranty by the assured, yet it is followed by the statement that any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every material fact to the risk, or any over-valuation or any misrepresentation whatever, or if the assured shall have made or shall make any fraudulent or false representation to the authorities touching the property hereby insured or property contained therein, with the intent to defraud the public revenue.

We understand the law to be that where a statement in the policy of insurance that the answers and statements in the application are warranted by the assured is followed by the further statement that any false representation by the assured of the condition, situation, or occupancy of the property relates to the answers to the questions in the application, such answers not material to the risk, that were honestly made in the belief they

were true, will not be binding on the assured or present any obstacle to recovery.

Continental Life Ins. Co. vs. Caroline Rogers, 119 Ill., 474.

As to the finding of the jury, that one of them smoked upon and in said mill, the finding is indefinite. It does not say when this took place; whether whilst the policy was in vogue or before. It might have been inadvertently that one of the proprietors of this mill, one of the plaintiffs, without thinking, lit his pipe and smoked at one time. That is all that the finding imports; but we hardly think that this would be sufficient to declare null and void the policy; especially in view of the findings that all their statements in reference to the value and incumbrance and everything made in the policy was made in good faith. The mere fact that one of them, forgetting himself for a moment, might have smoked in the mill, but perhaps recollecting himself quit and forbid all others from doing it, will not void the policy, especially where all of the statements have been made in good faith.

All the findings of the jury other than these, are to the effect that the statements made in their answers in the application by the plaintiffs were made in good faith, and there is nothing in the findings in this case that shows bad faith, so far as the not allowing smoking in the mill is concerned.

There is no authority, nor can one be found, where a court would base a judgment on a finding so indefinite, and where there is nothing going to show that this added to the risk in any way; but the reasoning of the authorities is all the other way, that good faith is all that is needed.

III.

NOT FAIRLY IN ISSUE.

The issue made on the smoking is this: "Is smoking or drinking of spirituous liquors allowed on the premises?" Said plaintiffs answered in writing in said application as follows: "No," and said defendants aver that said answer was false, and that smoking was permitted by said plaintiffs continuously, and engaged by them on said premises from the time of making said application until the fire mentioned in said plaintiffs' petition.

Now on that issue was taken, and the jury is asked to find whether smoking was allowed on said premises, and their answer is that plaintiffs forbid smoking to go on in the mill, but smoking was done on the grinding floor. The finding clearly shows that smoking was not allowed.

The defendants ask a finding that one of them himself smoked upon and in said mill insured by the defendants. Now, we first say that this is not fairly in the issue. That that finding is outside of the pleadings.

In Nebraska we have the code pleadings, and under our pleadings all special matters of defense must be pleaded. "Under the code all affirmative matters of defense, such as warranty, representations, concealments, etc., must be pleaded. The tendency of the courts at the present time is to construe policies of insurance so as to sustain them if possible, when the insured has not been guilty of bad faith or fraud."

Maxwell's Pleadings and Practice, 144.
McMaster vs. Insurance Co., 55 N. Y., 222.
Abbott's Trial and Evidence, 483.

T. M. MARQUETT, and
ISHAM REAVIS,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM 1887.

No. 263.

JAMES W. HOSFORD and CHARLES GAGNON, Copartners under the firm-name of HOSFORD & GAGNON, Plaintiffs in Error,

vs.

THE GERMANIA FIRE INSURANCE COMPANY and the HANOVER FIRE INSURANCE COMPANY, Associated together under the name of The Underwriters.

In Error to the Circuit Court of the United States for the District of Nebraska.

BRIEF FOR THE DEFENDANTS IN ERROR,

BY

SAMUEL SHELLABARGER,
J. M. WILSON.

THOMAS MCGILL & CO., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.

JAMES W. HOSFORD and CHARLES GAGNON, Copartners under the firm-name of HOSFORD & GAGNON, Plaintiffs in Error,

vs.

THE GERMANIA FIRE INSURANCE COMPANY, and the HANOVER FIRE INSURANCE COMPANY, Associated together under the name of THE UNDERWRITERS.

No. 263.

In Error to the Circuit Court of the United States for the District of Nebraska.

Brief for the Defendants in Error, by Samuel Shellabarger and J. M. Wilson.

This case comes to this court under certificate of division of opinion between the circuit and the district judges holding the Circuit Court for the District of Nebraska, pursuant to sections 650 and 651 of the Revised Statutes of the United States. The certificate is found in Record, 37, 38. The action was removed from the State to the Federal court, and was brought by the plaintiffs in error against the defendants in error upon a policy of insurance, No. 20,157, issued by the Germania

Fire Insurance Company and the Hanover Fire Insurance Company, of New York, the policy being dated, in the countersigning by the agent of the defendants, the 14th of May, 1883. (R., 8.)

The application upon which the said policy was issued appears at pages 11 to 17, and is dated the 14th of May, 1883. The application also appears in the special verdict of the jury. (R., 30 to 35, inclusive.)

The three questions on which the judges divided, and which are certified to this court, are as follows:

"1st. Whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

"2d. Whether the fact that delinquent taxes on the mill, to the amount of $329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurers, will defeat the plaintiffs' right to recover.

"3d. Whether the fact that smoking was done in the mill, the proprietor of the mill being one that smoked, notwithstanding the plaintiffs had stated in their application for insurance that smoking was forbid therein, will defeat their right to recover, the fire that destroyed the property not having originated from that cause.

"And the said points being at the time stated under the direction of the said judges, it is ordered that the said points be, and they are, certified to the Supreme Court of the United States, according to the statute in such case provided.

"DAVID J. BREWER,
"*Circuit Judge.*
"ELMER S. DUNDY,
"*District Judge.*"

I.

The first of these questions so certified, namely—"1st. Whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on

said verdict and special findings of the jury returned in said cause—is one of those general questions which, under the practice of this court, the court declines to take jurisdiction of, and we will, therefore, not, in this brief, consider it, except in so far as the answer to it is necessarily involved in the other two questions. That this first question is of a character, owing to its generality, which precludes the court from considering it, see the case of the United States against Waddell, 112 U. S., 81, and the cases there cited.

II.

The second question is—

"2d. Whether the fact that delinquent taxes on the mill, to the amount of $329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurers, will defeat the plaintiff's right to recover."

The most material parts of the record bearing upon the answer to this question, and most of them bearing upon the answer to the third question also, are the following:

1st. The policy expressly covenants as follows (R., 5):

"The application, survey, plan, or description of the property herein insured shall be considered a part of the contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any *omission* to make known every fact material to the risk, or any over-valuation or any misrepresentation whatever, either in a written application or otherwise;" renders void the policy.

2d. In said policy (R., 6) it is further stipulated that—

"If the interest of the assured in the property be any

other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, *or be incumbered by any lien, whether by deed of trust, mortgage, or* OTHERWISE, or if the building insured stands on leased ground, it must be so represented to the companies and so expressed in the written part of this policy; otherwise this policy shall be void."

3d. It is further stipulated in this policy (R., 8) that—

"It is further understood and made a part of this contract that the *agent* of these companies has *no authority* to *waive, modify*, or strike from the policy any of its printed conditions, nor is his assent to an increase of risk binding upon the companies until the same is endorsed in writing on the policy and the increase premium be paid; nor, in the event that this policy shall become void by reason of any of the conditions thereof, shall the agent have power to revive the same except by issuing a new policy, and any policy so made void shall remain void, and of no effect, until revived by the actual issue and delivery to the assured of the new policy, any contract by parol or understanding with the agent to the contrary notwithstanding."

The application of the insured (R., 11 to 17, inclusive; also 30 to 35, inclusive) contains a covenant in these words:

"The subscriber requests insurance against fire by the Germania and Hanover Fire Insurance Companies of New York on the foregoing-described property, *and hereby covenants and agrees to and with the said companies that the same is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risks of the property to be insured, and said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in and forming a part and parcel of the policy*," &c. (R., 17, and also 35.)

4th. The original answer relies on, amongst other things, the false representation "concerning the size,

capacity, value, title of said property, *liens and incumbrances against said property*, the size and value of the machinery, the value of the whole property," &c. (R., 9.) This part of the answer embraces the point stated in the ~~first~~ second question. The amended answer, (R., 23,) filed on the 5th of February, 1885, defends the false representation *regarding the matter of smoking*, covered by the third certified question.

5th. In the application, (R., 16, and also 34,) the question asked, concerning the smoking, and the answer thereto, are in these words:

"*Is smoking or drinking of spirituous liquors allowed on the premises?*"

"NO."

And the question regarding incumbrance, contained in the application, and the answer thereto, is as follows (R., 16, also 35):

"*If mortgaged, state the amount.*"

"*$3,000.*"

6th. The jury found "*that plaintiffs forbid smoking to go on in the mill, but smoking was done on the grinding floor*," (R., 29,) and also found that the application was in the words and figures set forth in Exhibit "A"; (found at R., 30 to 35, inclusive;) and the jury further found that "one of them" (applicants for the policy) "HIMSELF SMOKED UPON AND IN THE SAID MILL INSURED BY THE DEFENDANT;" (R., 29;) also found that the amount of mortgage incumbrance on the property at the *time of the application for the policy* was $3,079.45, (R., 29,) instead of $3,000, as stated in the application; (R., 35;) and that "*there were taxes of the county and State on said premises for several years prior to the issue of the policy which were delinquent and unpaid, and still remain unpaid, amounting to the sum of $329.40,*

on the 14th day of May, 188 ." (R., 29.) But the jury also make the contradictory finding that plaintiffs in their application did not misrepresent the amount of incumbrances or liens on said premises. (R., 29.)

III.

We now turn to the matter involved in the second question. Please observe that the policy itself expressly covenants that "*if the interest of the assured * * * be incumbered by any lien, whether by deed of trust, mortgage, or* OTHERWISE, * * * *it must be so represented to the companies and so expressed in the written part of this policy; otherwise this policy shall be void.*" (P. 6.)

Also observe that, wholly independently of the false answer made to the question at top of page 35 of the record, asking, "If mortgaged, state the amount," and *confining* our attention in our answer to this second certified question as to the effect of the failure to disclose the tax incumbrance stated at the bottom of page 29, we insist that the policy is necessarily rendered void by the failure to disclose, in the written part of the policy, that incumbrance, to wit, $329.40, which had for several years been in arrears as unpaid taxes and delinquent, thus putting in the most serious jeopardy the entire title of the assured.

Now, as to the vital importance and materiality of "encumbrances," and as to the proposition that the failure to disclose even "small encumbrances" on the property is, in case of a policy conditioned like the present one, absolutely fatal to the policy, this court has, in Insurance Company *v.* Fletcher, (117 U. S. R., 519–530,) fully determined on full review of the cases. There this court, in its approval of such cases as Loehner *v.* Insurance Company, (17 Mo., 247–256,) has decided that such encumbrance is material, and such

suppression is fatal to the policy; and so all the authorities are.

In May on Insurance (2d edition, sec. 290) the author says:

"Statements as to *incumbrances* are material, and have regard to the risk." (Citing the cases (in note 4) at 10th Cushing, 588; 38 N. H., 338; 46 Me., 394; 43 N. H., 176; 48 Wis., 26; and 35 Ohio State, 686.)

The reason why such matters of incumbrance so deeply affect the validity of these policies is because of the "effect they have upon the motives which the assured have in the preservation of the property."

The same author (sec. 291) says: "*A lien for taxes is an incumbrance.*"

And in the case of Wilbur *v.* Insurance Company, 10th Cush., 446, it is expressly decided that any misrepresentation as to the state of the tax liens, &c., upon the property has the effect of avoiding the policy, although not made with knowledge of their falsity or with the intent to deceive. The opinion is by Chief Justice Shaw. He there says, where stipulations as to the state of incumbrance, &c., are embodied in the policy itself, "they constitute part of the contract;" and he adds that it has been recently held that even where there is no lien in favor of the company for its premiums, yet the representations regarding incumbrance are material; and, being stipulated for as part of the contract, must be complied with, because it is part of the contract.

IV.

Having, in the preceding paragraph, shown that warranties, stipulations, and representations contained in the fire policy, and in applications therefor, relating to incumbrances, are material and have regard to the risk, as established by the authorities cited in Fletcher's case,

(117 U. S. R., 529, 530, 531,) and in note 4 to section 290 of May on Insurance (second edition); also that a lien for taxes comes with the signification of the word "encumbrance," found in the covenant in the policy above quoted, (R., 6, fol. 9,) we now proceed to some additional and kindred consideration going to establish that, by a breach of the said covenant, (fol. 9,) the policy is avoided, or rather never took effect.

And under this head we make the following suggestions:

First. That the facts in the present record do not show it to be a case where the court is justified in "*leaning*" to interpretations in favor of the assured; because the facts in the present case do not show equity in favor of the assured or against the insurers.

As to these facts and equities, notice that this is not a case where the company had been in the receipt of the premiums for a long time, and then, on the occurrence of loss, is attempting to "trump up," as is so usual, technical defenses in resistance of payment for losses.

In this case the insurance was taken out for but a single year; (R., 3 and 4); but one payment was made; the insurance was taken out on the 14th of May, 1883, (R., 1,) and the fire occurred the first day of August, 1883, only two and one-half months after the insurance; that the property covered by the policy sued on (No. 20,157) was, according to the finding of the jury, worth, in total value, but $19,000; (R., 28;) that the loss by the fire to the plaintiffs was but $18,500; that the insurance under said policy was for $8,000; and that, besides this $8,000, there were other insurances, one in the Hartford Company for $4,000 and one in the Underwriters for $8,000, making $12,000, (R., 35, and also 16,) the total insurance thus aggregating $20,000; that the jury find in this case that—

"In their" [the insured's] "written statements to

Gould (the agent of the defendants), shortly after the fire, Hosford & Gagnon made several *important* statements about the value and condition of the property, in which *one contradicted the other*, and said statements appear from the evidence adduced on the trial to have been incorrect." (R., 29, fol. 46.)

And this false statement is the one required, by the policy, to be on oath, and if false, avoids the policy. (R., 6, fol. 10 and 11.)

These and other like facts, taken in connection with the total concealment of the fact that there were "taxes of the county and State on said premises for several years prior to the issue of the policy, which were *delinquent and unpaid*, and *still remain* unpaid, amounting to the sum of $329.40, on the 14th of May, 1883;" (R., 29, fol. 26;) and, taken in connection with the *further* fact that the defendants made a false answer in regard to the amount of the mortgage at the date of the policy, (R., 29, fol. 46,) and made confessedly false answers regarding the fact of spirituous liquors and smoking being allowed on the premises, (R., 34, and also 16,) show that this is not a case for judicial "leaning" in favor of the assured.

Second. The next remark, under the present head, relates to the matter of the legal rules of construction, as well as the force and quality, of the terms of this policy relating to these incumbrances. The first legal suggestion touching this point is that both the covenant relating to "incumbraces," as contained in the body of the policy, (R., 6, fol. 9,) covenanting that the policy shall be void if any existing "incumbrance by any lien, whether by deed of trust, mortgage, or *otherwise*," is not "expressed in the written part of the policy," and the representations contained in the application touching the extent of the incumbrance (and which, by the express terms of the policy, are made part of the

contract and warranties) are in the nature of "*conditions precedent*" to the policy's taking effect as a binding obligation. And if the covenant or representation is not true or complied with, then the policy never took effect, and is absolutely void *ab initio*. This principle is fully stated and enforced in Cady *v.* Insurance Company, 4 Clifford, 203. On page 209 the court says:

"Warranties are of two kinds—affirmative and promissory—and they may arise from express words, or they may be implied. Affirmative warranties, whether express or implied, are representations in the policy of the existence of some fact or state of things at the time or previous to the time of making the policy, and they are conditions precedent, which, if untrue, the policy does not attach as the contract of the insurer." (Citing Newcastle *v.* MacMorran, 3 Dow., P. C. 262; Biccard *v.* Shepherd, 14 Moore, P. C., 474.)

The court further goes on to lay down expressly and distinctly upon the authorities the doctrine that—

"A warranty in respect to an existing fact is a *condition precedent*, and, if not true when reasonably construed, it avoids the policy."

It is proper that we, in passing, should carefully fix in mind, as applicable to all parts of the case, that, though it is true that answers, in an application, will be held only "representations," and not warranties, unless the intention to make them warranties is clearly shown, (Ins. Co. *v.* Radden, 120 U. S. R., 189,) yet the parties can, by their contract, make even answers, and things otherwise immaterial, to be material and warranties; (120 U. S. R., 189;) and that in the present case it is impossible to deny that the policy has made the suppression of "*encumbrance*" (fol. 9) vital as a warranty; and so also as to the use of tobacco. As to this the *repeated* stipulations are *explicit*, *unambiguous*, *consistent*, *and peremptory*.

Third. Another principle equally important must be here carefully presented. It is stated thus in section 156 of May on Insurance (2d edition):

"As a general rule, if these statements, stipulations, &c., *are contained in, or expressly made a part of, the policy*," [as they are in the present case, R., 3., fol. 5,] "*they become warranties, and are so denominated in the law of insurance.*" * * * "By a warranty the insured stipulates for the *absolute truth* of the statement made, and the *strict* compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a *condition precedent*, and, like that, must be *strictly* complied with." (Citing the authorities at 12 Cush., 416; 30 N. Y., 136; 98 Mass., 381.)

This rule is stated in Eddy Street Iron Foundry *against* Insurance Company, 1 Clifford, 306, in these words:

"But when the representations of the insured are expressly referred to in the policy as forming a part of the contract, they will acquire the character of *warranties*, and invalidate the insurance, unless *strictly complied with, whether they are or are not material to the risk assumed by the insurer.*"

In Nicoll *v.* Insurance Company, 3 Woodbury & Minot C. C. U. S. R., 502, this doctrine is strictly enforced, holding that warranties cannot be deviated from in the smallest particular. (See also 31 Me., 219; 2 Den., 75; 2 Comstock, 210; 3 Gray, 519; 49 Me., 200; 62 Barber, 636.) The last two cases are especially in point upon a proposition to which we presently again come, namely, that warranties must be complied with *whether they are material to the risk or not.* (See also 12 Cush., 424.) In the last case the court holds that, where the application stated that ashes were taken up and removed in *iron* hods, and the evidence was that

they were removed in *copper* ones, there the policy was bad. (And see also Insurance Company *v.* McDowell, 50 Ill., 131.)

We now recur to Eddy Street Iron Foundry *v.* Ins. Co., 1 Cliff., 306, where the court says:

"Even when the reference to the statements of the insured is not such as to render them warranties, as when they are expressly referred to as representations, it will still be *prima-facie*, if not conclusive, evidence of their *materiality* to the risk, and render any misrepresentation or concealment in making them fatal to the right of recovery against the insurer." (Citing 8 Metcalf, 114; 5 Hill, 82; 6 Cush., 42; 6 Cush., 340; 21 Conn., 19.)

Fourth. Another legal rule, here applicable, is thus stated in the case last cited (Eddy Street Foundry Company, 1 Clifford, 305):

"Parties to a policy of insurance may agree as to the materiality of the statements of the applicant, and such agreements, if made a part of the contract, will be respected by courts of justice. Accordingly, when the policy contains a clause declaring that the application forms a part of the policy," [as is true in this case, R., 3, fol. 5; also R., 17, fol. 26,] "it thereby becomes part of the contract, and all the material statements in the answer of the applicant are thereby *changed from representations into warranties.* In such a case the application is to be taken as part of the contract of insurance, in the same manner as it would be if incorporated into the policy itself." (Citing 41 Me., 208; 5 Hill, 188; 2 Den., 82; 6 Cush., 449; 26 English Law and Equity Reports, 238; 10 Cush., 444; 10 Cush., 448; and 2 Gray, 480.)

And this right of the contracting parties to stipulate so as to make that to be warranties which they may please, is the familiar law, asserted often by this court, as, for example, in Ins. Co. *v.* Radden, (120 U. S. R., 189,) where the court says:

"But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material."

And see, also, Moulor's case, (111 U. S. R., 340 and 341,) cited below.

Fifth. The stipulation regarding the existence of incumbrances, (R., 6, end of fol. 9,) and every other provision of the policy which became warranties, must not only be strictly complied with, or be true, but as to whether they affected the risk or *had to do with the loss is not material.* Being false in fact, they avoided the policy.

As a preliminary to the statement of the authorities upon this point, it is proper to say that, in all the particulars involved in the present inquiry, there is no *difference* in the legal rules applicable to a contract of *life* insurance, or one of fire, or of marine insurance. They are all common-law obligations, and governed by the rules of the common law; and what will constitute a warranty in the one class of cases, and what a material breach of warranty, and what a misrepresentation avoiding the policy, are alike in these different classes of insurances. Says May on Insurance (section 7):

"Insurance upon a ship or a house at a fixed valuation, and at an annual premium, until one is lost or the other burned, is in no way different in principle from the insurance of a life at a fixed valuation and at an annual premium until death. * * * The purpose in all cases is alike—indemnity for the loss of a valuable interest." * * *

And this court habitually cites the law of fire policies (see 117 U. S. R., 530) as applicable in life cases, and *vice versa.*

Therefore, authorities in life insurance cases touching the nature of warranties, representations, and the

like, are as pertinent here as are authorities in fire insurance cases.

In coming, now, to the point that, in case of breach of warranty, as distinguished from misrepresentation, "*the question of materiality is not open to inquiry*," the distinction between a warranty and a representation will, of course, be kept in mind. Says May on Insurance (section 183):

"The main distinction between a warranty and a representation—that, while the former is an agreement constituting a part of the contract, the latter is but a statement incidental thereto—is to be carefully observed, as it carries with it important consequences. A warranty enters into and forms a part of the contract itself. It defines, by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. No liability can arise except *within those limits*. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case, the party seeking his indemnity must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon him to present a case in all respects conforming to the terms under which the risk was assumed. And it is sometimes said that it must not be merely a substantial conformity, but exact and literal, not only in material particulars, but in those that are immaterial as well. On the other hand, a representation is, in its nature, no part of the contract. Its relation to the contract is usually described by the term 'collateral.'"

Then, in section 184, the author proceeds:

"Out of this distinction arises the question of materiality. Representations need not, like warranties, be strictly and literally complied with, but only substantially and in those particulars which are material to be disclosed to the insurers to enable them to determine whether they will enter into the contract, and upon

what terms. In case of warranty, *the question of materiality does not arise.* In case of representation it always does; and if this materiality depends upon facts and circumstances, it is a question for the jury, to be inferred from those facts and circumstances, as is also the materiality of a concealment."

Then, section 185, the author proceeds:

"But when the representations are in writing, and the parties, by the frame of the contents of the papers, either by putting representations as to the history, quality, or relations of the subject insured into the form of specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall deem material, they are to be declared so by the court, and the insured cannot be permitted to show that fact which both parties have treated as material is in fact immaterial. * * * The inquiry and answer are tantamount to an *agreement that the matter inquired about is material, and its materiality is not, therefore, open to be tried by the jury.*"

To this point is cited 4 R. I., 141; 18 N. Y., 376; 98 Mass., 381; 31 Iowa, 216; 39 N. Y., 90; 17 Minn., 497; 1 Irish Jur. Rep., (Q. B.,) 245; 45 Wis., 622; 22 Wall., 47, and 91 U. S., 512.

In the case in 22 Wallace, 47—Jeffries *v.* Insurance Company—the Supreme Court held that where the applicant answered that he was a single man, when, in fact, he was married, the policy was held void. The court there held that the answer by the assured that he was a single man, when, in fact, he was married, avoided the policy, without regard to the question as to the *materiality* of the answer.

The same thing is decided in Insurance Company *v.* France (91 U. S., 512). In Insurance Company *v.* Trefz, the court reaffirms this doctrine, remarking (104 U. S. R., 202):

"It is unquestionable law, that, in such a case as the

present, the answer must be true to justify a recovery, without regard to these considerations;" [respecting the materiality of the answer,] "and for a lack of substantial truth, it is no valid excuse that the party giving the answer did not understand, from ignorance or otherwise, the scope of the question. And so, in the present case, the court below distinctly charged the jury."

This court then sets out (page 202) the charge to the jury, where the court, amongst other things, instructed the jury that—

"If they" [the representations] "are in any respect untrue, they void the contract and prevent a recovery upon the policy."

This charge this court approved.

And in Moulor *v.* Insurance Company, 111 U. S., 335, this court reaffirmed the same doctrine. In that case the court examined all the terms of the application and of the policy, in order to ascertain its meaning, and held that these showed it "to be reasonably clear that the company required, as a condition precedent to a valid contract, *nothing more* than that the insured should *observe good faith* towards it—that, in the *absence* of explicit stipulations, making the truthfulness of the statements, in the application, a part of the contract, it should not be *inferred* that the parties intended to make absolute truth a condition of the policy. But, after guarding itself thus, the court reaffirms the doctrine of Jeffries *against* Insurance Company, and Ætna *v.* France, cited below, the court saying that where, "upon a reasonable interpretation," it appears that the intention was to make the representations conditions of the contract, there it is "the duty of the court to enforce it according to its terms; *for the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon conditions or contingencies such as the*

court below decided were embodied in the policy in suit. The contracts involved in Jeffries *v.* Life Ins. Co., 22 Wall., 47, and Ætna Life Ins. Co. *v.* France, &c., 91 U. S., 510, were held to be of that kind."

Chief Justice Shaw, in the case of Daniels *v.* Insurance Company, 12 Cush., (66 Mass.,) on bottom of page 423, says:

"If, by any words of reference, the stipulation in another instrument, such as the proposal or *application*, can be construed a warranty, it must be such as make it in legal effect a part of the policy."

In the present case this is repeatedly and expressly done, as we have already seen.

The chief justice proceeds, when speaking of the *difference* between representation and a warranty, in the following words:

"The difference is most essential, as indicated in the definition of a warranty in the case last cited," [6 Cush., 47,] "and as stated by the counsel for the defendants in the prayer for instruction. If any statement of fact, *however unimportant* it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it *avoids* the policy; if it be construed a representation, and is untrue, it does not avoid the contract if not willful, or if not material. To illustrate this; the application, in answer to an interrogatory, is this: 'Ashes are taken up and removed in iron hods;' whereas it should turn out in evidence that ashes were taken up and removed in copper hods; perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive; but, more especially, because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract, or in fixing its terms." (See also cases 49 Me., 200; 62 Barber, 636; and 50 Ill., 31, already above cited.)

The result of all that has been gone over is to establish that the stipulation at page 6, folio 9, covenanting that, "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, *or be incumbered by any lien, whether by deed of trust, mortgage, or otherwise*, or if the building insured stands on leased ground, it must be so represented to the companies, and so expressed in the written part of this policy, otherwise this policy shall be void," is a covenant of *warranty*, and was grossly and materially false at the time it was made, as disclosed by the finding of the jury. (R., 29, fol. 46.) The jury found that, at the time of the application, "there were taxes of the county and State on the said premises for several years prior to the issue of the policy which were delinquent and unpaid, and still remain unpaid, amounting to the aggregate sum of $329.40 on the 14th of May, 1883."

Here was a notorious and most material fact, existing for years in the shape of delinquent taxes against this property, of which these applicants for insurance must have been fully aware. These taxes were a lien upon the property. (See Compiled Statutes of Nebraska, page 426, sections 138, 139.)

Section 138 reads:

"Taxes assessed on real property shall be a lien thereon from and including the first day of April in the year in which they are levied until the same are paid."

Section 139 reads:

"The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the collector."

These liens threatened, in the gravest possible manner, the title of the insured in the premises, and yet they to-

tally concealed the fact; and did this in violation of their covenant at folio 9, touching incumbrances. This, we submit, avoids the policy *ab initio*, and the second question must be answered in the affirmative.

V.

We now turn to the question as to how the third question shall be answered, (R., 38,) namely, the question—

"3d. Whether the fact that smoking was done in the mill, the proprietor of the mill being one that smoked, notwithstanding the plaintiff's had stated in their application for insurance that smoking was forbid therein, will defeat their right to recover, the fire that destroyed the property not having originated from that cause?"

In Insurance Company of North America *v.* McDowell and Others (50 Ill., 131) the policy contained a statement that "smoking was not allowed." The court remarks that at one time smoking was done, but as soon as appellees were informed that it was prohibited by the policy it was stopped, and notice prohibiting smoking was posted—this some time before the loss occurred. The court remarks upon this state of facts:

"In such a case the assured only undertakes that he will not *himself do the act, or allow others to do so, if by reasonable precaution he can prevent it.* He does not, by such an answer to the question whether smoking is prohibited, insure that it shall not be done, or that if done he will forfeit his policy. He only undertakes that it shall not be done *with his consent, and that he will use reasonable diligence to prevent it.* (Daniel *v.* Hudson Fire Ins. Co., 12 Cush., 426.) When appellees prohibited smoking and posted the notice they did all that was required of them."

The same doctrine, on, in substance, the same state of facts, is repeated in Aurora Fire Insurance Company *v.* Eddy, 55 Ill., 219.

Regarding this same matter, May on Insurance, section 245, states the law thus:

"An agreement that smoking shall be prohibited, and a statement that smoking is not allowed upon the insured premises, means simply that the insured *will not himself smoke on the premises*, and will prohibit, and take reasonable precautions to prevent, others from smoking."

In section 405 the same author states this matter in these words:

"If smoking be prohibited, or declared to be not allowed, a prohibition by the insured, with *abstinence on his own part, and reasonable and proper precautions against it on the part of others*, is a compliance with the requirements."

To these statements of the rule the author cites the above cases from Illinois.

The author is here stating, as are also the above Illinois cases, the rule applicable where the provision as to smoking is in the nature of a representation, as distinguished from a warranty.

But whether ordinarily it is regarded, as a warranty or as a representation merely, in either case the fact found by the jury that the insured *himself smoked on the premises is fatal to the policy*, because the policy makes compliance with the rule as to smoking a warranty and material, (see Recod, end of fol. 7 and first of fol. 8; also fol. 26,) *and it was violated by the insured himself.*

The authorities already gone over, bearing upon this, make this plain; and it would be mere repetition to extend the brief touching this point.

The second question (R., 38) confines itself to incumbrance by delinquent taxes, amounting to $329.40, and does not allude to the false answer regarding *mortgage* incumbrance, at top of page 35, R., also 16 of R.

If, notwithstanding the second question is so confined to the matter of tax incumbrance, this court will consider the effect of the false answer to the question, (top of page 35 of Record,) "If mortgaged, state the amount," then the false answer to this question is also fatal to the policy, for the reason that the answer is made a warranty. (See, as to this, the cases approved by this court in New York Life Ins. Co. *v.* Fletcher, 117 U. S. R., 530; and especially the case there approved by this court of Loehner *v.* Home Mutual Ins. Co., 17 Missouri, 247, 256.) In commenting upon this last case, this court says (117 U. S. R., 530):

"The answer to the action on the policy set up that the application did not truly state the *encumbrances*. A *small incumbrance* upon the premises was not stated, and on the trial evidence was offered that its existence was made known to the agent of the company at the time of the application, but that he refused to write it down, saying that the amount was too trifling. *The evidence was excluded*, and the Supreme Court *sustained the ruling*, holding that the objection that the incumbrance was not stated could not be obviated in that way. 'Independently of the statute of the State,' said the court, 'which required the incumbrance to be expressed in the policy at the peril of its being void, there was a memorandum indorsed on it, which made known that the company would be bound by no statement made to the agent not contained in the application. The facts being as represented, they could not give the plaintiffs a right of action on the policy in the teeth of the statute, *and against the terms of the contract.*'"

This, and like authorities approved by this court, render this impossible, as seems to us, to sustain the present policy, if there were no other objection to it than the false answer in regard to the mortgage incumbrance, *provided* that matter is not excluded from being here and now considered by the character of the questions certified.